83-1121

No.

In the Supreme Court of the United States

October Term, 1983

PAUL F. GRAY, JR., *Petitioner*,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Sixth Circuit was correct in holding that petitioner is collaterally estopped from denying liability for civil fraud penalties under 26 U.S.C. § 6653(b), as a result of his guilty plea under 26 U.S.C. § 7201 for willful attempt to evade or defeat tax.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit, dated June 6, 1983, which affirms the Memorandum Decision by the United States Tax Court, is attached. Appendix A1.

The Memorandum Decision of the United States Tax Court, dated January 5, 1981, is reported at 10 Standard Federal Tax Reporter (CCH) ¶ 7402(M) and at 41 T.C.M. 682. Appendix A18.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit, from which certiorari is sought, was dated and entered on June 6, 1983.

The order denying the Petition for Rehearing with Suggestion for Rehearing *En Banc* was dated and entered on September 30, 1983.

Jurisdiction of the Supreme Court of the United States is invoked under Title 28 U.S.C. § 2101, and Rule 17C of the Supreme Court Rules.

STATUTES

Title 26 U.S.C.A.

Internal Revenue Code
Section 6653. FAILURE TO PAY TAX.

• • •

(b) FRAUD.—If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a). In the case of a joint return under section 6013, this subsection shall not apply with respect to the tax of a spouse unless some part of the underpayment is due to the fraud of such spouse.

Title 26 U.S.C.A.

Internal Revenue Code
Section 7201. ATTEMPT TO EVADE OF DEFEAT TAX.

* * *

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000.00, or imprisoned not more than 5 years, or both, together with the cost of prosecution.

STATEMENT OF THE CASE

This case concerns the application of the doctrine of collateral estoppel. In 1975 Petitioner Paul F. Gray, Jr. was indicted in the United States District Court for the Eastern District of Tennessee on three counts of attempting to evade and defeat income taxes for the calendar years 1968, 1969, and 1970, under Section 7201 of the *Internal Revenue Code* (26 U.S.C.A. § 7201). Appendix A58. Gray faced possible criminal penalties of up to fifteen years in prison and $30,000.00 in fines. In April of 1975, he was arraigned and pled not guilty to all counts. At that time, Gray was unmarried and had custody of several minor children. He was also the owner and sole operator of six business entities which included an aviation service, two cab companies, a nightclub and an apartment complex. In consideration of these circumstances, Petitioner's counsel negotiated a plea bargaining agreement with the United States Attorney. As a result, Petitioner was re-arraigned and requested permission of the Court to withdraw his pleas of not guilty to each count and to substitute a plea

of guilty. As a consequence of his change in plea, Gray was to serve 100 days in a "jail type institution," pay a $2,000.00 fine for each of the three counts against him, and was to be placed on probation for two years following his imprisonment. Appendix A57. The "imprisonment" consisted of Gray serving his time in Gatlinburg, Tennessee with his family. Before and during the arraignment process, Gray was never advised either by his own counsel, counsel for the government, or by the Court itself, that the government would later contend that his plea of guilty to the willful attempt to evade or defeat tax would estop him from contesting the 50% civil fraud penalty provided by Section 6653(b) of the *Internal Revenue Code*. In fact, the United States Attorney made the following statement in open court during the arraignment:

> . . . I should have stated for the Court's elucidation that Mr. Gray should have been advised through his attorneys, and I am sure he has likewise, that the matter we are attempting to reach a disposition of is the criminal case alone, *it makes no disposition of the civil tax liability of Mr. Gray and he should understand that.* [emphasis added]

Transcript of Rearraignment (May 6, 1975), see Appendix A43.

After Petitioner completed his sentence and paid the fines, the government sent a deficiency notice to him in which the government proposed to assess a 50% fraud penalty for the years 1968, 1969, and 1970, said penalties totaling over $51,000.00. Gray contested the proposed assessment of fraud penalties by filing a petition in the United States Tax Court, said Court being the Federal Court of original jurisdiction. The government then filed a motion for partial summary judgment contending that the plea of guilty in the criminal matter collaterally estopped

Gray from denying that he was liable for the civil fraud penalty. Although Judge Chabot was sympathetic to Petitioner's position, the Judge insisted that his hands were tied by Tax Court precedent and therefore granted the government's motion. In granting that motion the Tax Court held that Gray was collaterally estopped from denying that his returns for 1968, 1969, and 1970 were fraudulent because he had previously pled guilty to the willful attempt to evade or defeat tax.

Petitioner submits that his plea of guilty in the criminal case should be treated only as an admission against interest and should not be conclusive in regard to the civil penalties. During his arraignment, he received assurances from the government and the Court that his plea of guilty would be used solely to terminate the criminal matter that was pending against him. Petitioner contends that he would not have changed his plea had he known that he would be foreclosed from contesting the imposition of civil penalties.

While the remainder of the civil case as to the correct amount of the deficiencies was pending, counsel for Gray filed a motion for a Writ of Error Corum Nobis in the criminal matter before the District Court for the Eastern District of Tennessee. The District Court was asked to vacate and set aside Gray's conviction and to permit him to withdraw his guilty pleas. Petitioner alleged that the government had breached its plea bargaining agreement by assessing the civil penalties. In denying the motion, the District Court held that it was not necessary for a party to be told of the collateral consequences of his plea at his arraignment. Appendix A34. The District Court's decision was affirmed by the United States Court of Appeals for the Sixth Circuit on July 16, 1981. *Gray v. United States*, No. 80-5436 (6th Cir. July 16, 1981). Appendix A26-A30.

Gray then petitioned for a writ of certiorari to this Court which was denied on January 11, 1982. Appendix A25. In its Memorandum in Opposition to the Petition for Writ of Certiorari, the Department of Justice made the following statement:

> Petitioner also suggests . . . that it is unjust to apply the doctrine of collateral estoppel to bar a defendant who pleads guilty to charges of tax evasion from contesting fraud penalties asserted in subsequent civil proceedings. The question of the propriety of the application of collateral estoppel, however, is irrevelant to the issue here presented, i.e., whether petitioner voluntarily and knowingly entered his guilty plea. Rather, that issue should be raised and resolved in the context of the proceedings in which the collateral estoppel doctrine is invoked.

Memorandum for the United States in Opposition at 5-6, n.3, *Paul F. Gray, Jr. v. United States,* 454 U.S. 1143 (1982). Petitioner agrees with the Department of Justice and asserts that the submission of this Petition is both timely and proper.

In 1981, the Tax Court entered its decision as to the amount of the deficiencies and then held Gray liable for the 50% fraud penalties without any hearing on the matter whatsoever. Appendix A18. The United States Court of Appeals for the Sixth Circuit affirmed the decision of the Tax Court on June 6, 1983, with a vigorous dissent filed by Judge Gilbert Merritt. Appendix A1. A Petition for Rehearing with Suggestion for Rehearing *En Banc* was filed in the Sixth Circuit Court of Appeals, and the order denying that petition for rehearing was filed on September 30, 1983. Appendix A17.

ARGUMENT

The specific facts of Petitioner's case have never been presented to the United States Supreme Court, but on several occasions this honorable Court has addressed the doctrine of collateral estoppel. As stated by Justice Stewart in 1980, the purpose of the doctrine is to avoid the burden upon the judicial system caused by relitigating identical issues involving the same parties. However, Justice Stewart also carefully pointed out that this harsh rule should only be applied in limited circumstances:

> . . . Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude *relitigation* of the issue in a suit on a different cause of action involving a party to the first case. *Montana v. United States,* 440 U.S. 147, 153, 59 L. Ed.2d 210, 99 S. Ct. 970. As this Court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. Id., at 153-154, 59 L. Ed.2d 210, 99 S. Ct. 970.
>
> In recent years, this Court has reaffirmed the benefits of collateral estoppel in particular finding the policies underlying it to apply in contexts not formerly recognized at common law. . .
>
> But one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a *'full and fair opportunity' to litigate that issue* in the earlier case. *Montana v. United States,* supra, at 153, 59 L. Ed.2d

210, 99 S. Ct. 970; *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, supra, at 328-329, 38 L. Ed.2d 788, 91 S. Ct. 1434. [emphasis added]

Allen v. McCurry, 449 U.S. 90, 94-95 (1980).

Applying the above stated requirements to the facts of this case, the major inquiry becomes whether the Petitioner had the requisite "full and fair opportunity to litigate" the fraud issue when he pled guilty at his arraignment to the attempt to willfully evade taxes. This limitation of the application of the doctrine of collateral estoppel was reviewed by this Court in *United States v. International Building Company*, 345 U.S. 502 (1953), citing long established precedent first set in 1876 in the case of *Cromwell v. County of Sac*, 94 U.S. 351 (1876):

> 'where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.'

345 U.S. at 504-505.

This Court's decision in *International Building* demonstrates that the concept of litigation goes beyond the idea of a mere judgment. In that case, a judgment had been entered pursuant to a joint stipulation by the taxpayer and the Internal Revenue Service. The judgment

specifically stated that no deficiency existed. Although the Internal Revenue Service had originally attacked the basis used by the taxpayer for a particular piece of property, the Court held that the government was not precluded from again attacking the basis of that same piece of property for later tax years. In a unanimous decision, this Court emphasized that "no briefs were filed or arguments had" in the previous action, *Id.* at 504, and further noted that the previous judgment was reached without an adjudication on the merits

> As the case reaches us, we are unable to tell whether the agreement of the parties was based on the merits or on some collateral consideration . . . but unless we can say that they were an *adjudication of the merits*, the doctrine of estoppel by judgment would serve an unjust cause: it would become a device by which a decision not shown to be on the merits would forever foreclose inquiry into the merits. Estoppel by judgment includes matters in a second proceeding which were actually presented and determined in an earlier suit. *See Commissioner v. Sunnen*, supra (333 U.S. 598). A judgment entered with the consent of the parties may involve a determination of questions of fact and law by the Court. But unless a showing is made that that was the case, the judgment has no greater dignity, so far as collateral estoppel is concerned, than any judgment entered only as a compromise of the parties. [emphasis added]

345 U.S. at 505, 506. It is important to note that the above referenced case resulted in a favorable decision for the Internal Revenue Service, and this limited application of the rule enabled the government to bring forth additional evidence on the same issue in the second action.

In addition, this Court has previously emphasized that a number of factors may influence a litigant as to the strategies undertaken in parallel lawsuits. Different risks and considerations may be involved in different actions although they arise out of the same facts and concern the same parties:

> Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defense in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these ought not be precluded from contesting, in a subsequent action, other demands arising out of the same transaction.

Cromwell, 94 U.S. at 356. Furthermore, a clear distinction is apparent between a judgment obtained by consent and a judgment obtained after a trial on the merits during which the issues are brought into controversy:

> The established rule in this court is that if in a second action between the same parties, a claim or demand different from the one sued upon in the prior action is presented, then the judgment in the former cause is an estoppel 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' *Bates v. Bodie*, 245 U.S. 520, 526; *United States v. Moser*, 266 U.S. 236, 241; *United Shoe Machinery Corp. v. United States*, 258 U.S. 451, 458. 'While a defendant must bring forward all purely defensive matter, he is not barred by a former judgment against him as to any

> matter which he was not bound to present and which was not in fact litigated. A judgment is not conclusive of those matters as to which a party had the option to but did not in fact put in litigation in the action.' Freeman on Judgments, 5th ed. § 786.

Larsen v. Northland Transportation Co., 292 U.S. 20 (1934) at 25. This explanation clearly states that an issue must be brought into controversy in order for a judgment in a previous lawsuit to be conclusive upon that issue in a subsequent action.

Several aspects of the doctrine of collateral estoppel have been emphasized by the above referenced United States Supreme Court opinions. In order to deny a hearing on a particular point, there must have been an "adjudication on the merits" of that point. Further, it has been stated that the matter must have been brought into "controversy" in the previous action, and that the party must have had a "full and fair opportunity to litigate" the issue.

These key phrases are of primary importance in understanding the limited role of collateral estoppel. The concept of what may constitute a "full and fair opportunity to litigate" has been addressed by Professor Moore in his Federal Practice treatise:

> A more basic reason exists for denying collateral estoppel effect to a judgment of conviction based on a guilty plea. A judgment based upon the parties' consent provides no reasonable basis for inference that the parties litigated, or the court adjudicated, any issue—it indicates the contrary. Since the rationale of collateral estoppel required litigation and adjudication to make the issues conclusive in subsequent litigation, there is no more basis for applying the doc-

> trine to a conviction by consent than to a civil judgment by consent, and generally the civil judgment does not have collateral estoppel effect.

1B *Moore's Federal Practice* ¶ 0.418[1] at 558-559 (2nd Ed. 1948). This principle has also been examined in a similar context by the noted legal scholars Charles Wright, Arthur Miller, and Edward Cooper in their treatise *Federal Practice and Procedure*, § 4474 (1981), in which they state the following:

> Conviction upon a plea of guilty does not rest on actual adjudication or determination of any issue. Just as issue preclusion should not rest on civil judgments by consent, stipulation, or default, so it should not rest on a plea of guilty.

Id. at 759-760. It cannot be said that there has been a full and fair opportunity to litigate when there has been no litigation whatsoever. When judgment is obtained by consent, there has been no occasion for dispute and no issue has been brought into controversy. The assumption that a conviction upon a plea of guilty is somehow a fair determination of the issue for all situations that may arise belittles the importance of an adversary hearing. It also assumes that a waiver of a right to actually litigate in one situation is a wavier in quite different circumstances. The California Supreme Court has recognized the importance of limiting the application of the doctrine of collateral estoppel to cases of actual litigation:

> A plea of guilty is admissible in a subsequent civil action on the independent ground that it is an admission. It would not serve the policy underlying collateral estoppel, however, to make such a plea conclusive. 'The rule is based upon the sound public policy of limiting litigation by preventing a party who

> has had one fair trial on an issue from again drawing it into controversy.' (*Bernhard v. Bank of America*, 19 Cal.2d 807, 811, 122 P.2d 892, 894) 'This policy must be considered together with the policy that a party shall not be deprived of a fair adversary proceeding in which fully to present his case.' (*Jorgensen v. Jorgensen*, 32 Cal.2d 13, 18, 193 P.2d 728, 732) When a plea of guilty has been entered in the prior action, no issues have been 'drawn into controversy' by a 'full presentation' of the case. It may reflect only a compromise or a belief that paying a fine is more advantageous than litigation. Considerations of fairness to civil litigants and regard for the expeditious administration of criminal justice (see *Vaughn v. Jonas*, 31 Cal.2d 586, 594, 191 P.2d 432) combine to prohibit the application of collateral estoppel against a party, who, having pleaded guilty to a criminal charge, seeks for the first time to litigate his cause in a civil action.

Teitelbaum Furs, Inc. v. Dominion Insurance Co., 58 Cal.2d 601, 375 P.2d 439, at 441 (1962).

A similar view has been taken in *Mertens Law of Federal Income Taxation* wherein it is suggested that "even though a taxpayer may have pleaded guilty to a criminal indictment of fraud, it should not be conclusive evidence against the taxpayer in the civil proceeding as to the imposition of the fraud penalty." *Mertens*, § 55.18 (1976 Ed.) at 107. Petitioner is not claiming that the guilty plea is inadmissible for any purpose. Petitioner is simply requesting that he be given at least one opportunity to introduce and explain facts showing that there is no basis for the civil fraud penalty, an opportunity that has heretofore been denied him.

Petitioner admits that there is authority from lower federal courts favoring the Internal Revenue Service. Most of those courts, however, were considering cases that involved a conviction in the first proceeding after a full trial on the merits.[1] Only the First and Seventh Circuits followed the decision in *Arctic Ice Cream v. Commissioner*, 43 T.C. 68 (1964), in which the Tax Court found that a guilty plea does collaterally estop a taxpayer in a subsequent civil proceeding. *See Fontneau v. United States*, 654 F.2d 8 (1st Cir. 1981); *Plunkett v. Commissioner*, 465 F.2d 299 (7th Cir. 1972). Moreover, in both of these cases, it was carefully pointed out that the taxpayer understood both the criminal and civil consequences of his pleading guilty. "Fontneau chose to plead guilty, fully cognizant of the ramifications in terms of civil penalties." *Fontneau*, 654 F.2d at 10. "Plunkett . . . acknowledged that he was fully aware of the charges against him and of the consequences of his plea." 465 F.2d at 306. These cases are clearly distinguishable from the instant case because it is undisputed that Petitioner neither understood nor was advised that his plea of guilty would have permanent collateral civil consequences. Indeed, Petitioner was informed in open court by the United States Attorney that his plea made "no disposition of the civil tax liability." Appendix A43.

An additional distinguishing factor is that both of these circuit court cases relied on the *Arctic Ice Cream* decision in which the defendant was a corporation. Differing considerations were present there, because a cor-

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1. *See Tomlinson v. Lefkowitz*, 334 F.2d 262 (5th Cir. 1964); *Armstrong v. United States*, 354 F.2d 274 (Ct. Cl. 1965); *Moore v. United States*, 360 F.2d 353 (4th Cir. 1965); *Amos v. Commissioner of Internal Revenue*, 360 F.2d 358 (4th Cir. 1965); *Neaderlander v. Commissioner of Internal Revnue*, 424 F.2d 639 (2nd Cir. 1970); *Considine v. United States*, 683 F.2d 1285 (9th Cir. 1982).

poration which pleads guilty obviously cannot be the subject of imprisonment.

Nor was the position taken by the Tax Court unanimous. Eight dissents were filed by Tax Court Judges in *Arctic Ice Cream* and its companion case *Amos v. Commissioner*, 43 T.C. 50 (1964), *aff'd*, 360 F.2d 358 (4th Cir. 1965). In Judge Withey's strong dissenting opinion in *Amos*, he discussed the Tax Court's substantial departure from long standing principles of the doctrine of collateral estoppel:

> Long ago the Supreme Court in *Sunnen v. Commissioner*, 333 U.S. 591 (1948), cautioned against the use of this aid [collateral estoppel] to the lessening of litigation particularly in tax cases. It was there said that 'it must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged.' It has been an accepted principle for many years that collateral estoppel is not applicable as between a criminal conviction and a civil issue. *United States v. Glidden Co.*, 119 F.2d 235 (C.A. 6, 1941), certiorari denied 314 U.S. 678 (1941); *Ferroni v. United States*, 53 F.2d 1013 (C.A. 7, 1931), certiorari denied 285 U.S. 543 (1932); *New York Life Insurance Co. v. Murdaugh*, 94 F.2d 104 (C.A. 4, 1938); *Scientific Machine Co. v. Simmons*, 43 N.Y.S.2d 376 (1943); *Stagecrafters' Club v. District of Columbia Division*, 111 F. Supp. 127 (D.C. 1953). In *United States v. Glidden Co.*, supra, it was stated: 'the rule prevails that a former adjudication in a criminal action is not generally a bar to a subsequent civil action, because of the different object of the proceedings and their dissimilarity in parties, rules of decision and

> procedure. .' To now overturn this settled law in so sweeping a manner as has been done here seems to me the grossest kind of judicial legislation.

Amos v. Commissioner, 43 T.C. 50, 61 (1964) (Withey, J., dissenting).

Assuming for the purposes of argument that these cases are not distinguishable, Petitioner asserts that they were erroneously decided and are in direct opposition to principles already enunciated by the United States Supreme Court. The Sixth Circuit held below that Gray was "fully examined" at his arraginment and "voluntarily" pled guilty to the charges. *Gray*, 708 F.2d at 246. Petitioner's voluntary plea to "willful evasion" as a matter of Fifth Amendment Due Process is an entirely different question from whether he had a "full and fair opportunity to litigate" the civil fraud issue. Because the judgment was obtained by consent, no issues were brought into controversy and there was no adjudication on the merits as required by this Court for the doctrine of collateral estoppel to apply.

Petitioner's position is further supported by a decision of the Tenth Circuit Court of Appeals. In that case, the Internal Revenue Service had assessed a deficiency against the taxpayer and later filed a brief in which it abandoned its claim. The Court found that the Internal Revenue Service was not precluded from raising a question in litigation in later years concerning the same issue:

> The doctrine of collateral estoppel is strictly applied in tax cases. . . It . . . is applicable only when an issue identical to that presented in the second case has been raised and fully adjudicated under identical and inseparable relevant facts in a prior action between the same parties involving a different

tax year. *Jones v. United States*, 466 F.2d 131, 133 (10th Cir. 1972), *cert. den'd*, 409 U.S. 1125, 93 S. Ct. 938, 35 L. Ed.2d 257 (1973).

Adolph Coors v. Commissioner, 519 F.2d 1280 (10th Cir. 1975) at 1283. It should be noted that the limited application of the doctrine of collateral estoppel adopted in this case was used to further the position of the government as it was in *International Building*. The Internal Revenue Service should not be allowed to profit from the limited application of the doctrine on the one hand and then not be bound by that limitation when it is applied in favor of the taxpayer.

The Second Circuit Court of Appeals has also implicitly approved this limitation of the use of collateral estoppel. In *Kreps v. Commissioner*, 351 F.2d 1 (2nd Cir. 1965), that Court noted in dictum that the plea of guilty to a criminal charge in that case was merely an evidentiary admission in the subsequent civil case. In support of this point that Court cited a United States District Court case from New York which held that the taxpayer's plea of guilty to filing false and fraudulent returns was only an admission against interest in the civil case. *See United States v. Buschman*, 208 F. Supp. 531 (E.D.N.Y. 1962).

Another aspect of the unfairness of the doctrine of collateral estoppel as it was applied in the lower courts in this case is based upon the theory of the lack of mutuality. Judge Pierce discussed this theory in his dissenting opinion in the *Amos* decision. *See Amos v. Commissioner*, 43 T.C. 50, 63 (1964) (Pierce, J., dissenting). If a taxpayer in the criminal proceeding is acquitted, the Internal Revenue Service is not estopped from claiming a civil fraud penalty; whereas, if the taxpayer is convicted in the criminal proceeding, his conviction does estop him

from denying the civil fraud penalty. Because it is the custom of the Internal Revenue Service to settle the criminal aspects of a case first, the government has an unfair advantage over all taxpayers.

It is well settled that the purpose of the doctrine of collateral estoppel is to prevent multiple lawsuits, and, therefore, to reduce the costs to the parties involved and prevent the waste of relitigating identical issues. However, the federal decisions below wherein a guilty plea in a previous proceeding estops a hearing on the matter in the subsequent civil proceeding,[2] exceed the character and purpose for which the doctrine was developed. There is no imposition upon the judicial system or upon an adverse party in allowing a litigant one fair hearing upon each issue. Furthermore, the application of collateral estoppel in this instance will not accomplish a marked saving of judicial time. Some deficiency must be proved to establish a willful evasion under Section 7201, although the exact amount need not be shown. Therefore, even though the taxpayer may be collaterally estopped to relitigate the issue of fraud, the exact deficiency to which the penalty will attach is still subject to litigation. Thus, whether collateral estoppel is applied, the court must still re-examine each item of the taxpayer's income and expense.

In addition, extending the rule to cover cases involving guilty pleas will most probably discourage settlement. This philosophy has been reviewed by the American Law Institute in the *Restatement (Second) of Judgments*, § 27, Comment e (1980), which states:

> A judgment is not conclusive in a subsequent action as to issues which might have been but were

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2. *Fontneau v. United States*, 654 F.2d 8 (1st Cir. 1981); *Plunkett v. Commissioner*, 465 F.2d 299 (7th Cir. 1972).

not litigated and determined in the prior action. There are many reasons why a party may choose not to raise an issue, or to contest an assertion, in a particular action. The action may involve so small an amount that litigation of the issue may cost more than the value of the lawsuit. Or the forum may be an inconvenient one in which to produce the necessary evidence or in which to litigate at all. The interest of conserving judicial resources, of maintaining consistency, and of avoiding oppression or harassment of the adverse party are less compelling when the issue on which preclusion is sought has not actually been litigated before. And if preclusive effect were given to issues not litigated, the result might serve to discourage compromise, to decrease the likelihood that the issues in an action would be narrowed by stipulation, and thus to intensify litigation.

It is true that it is sometimes difficult to determine whether an issue was actually litigated; even if it was not litigated, the party's reasons for not litigating in the prior action may be such that preclusion would be appropriate. But the policy considerations outlined above weigh strongly in favor of nonpreclusion, and it is in the interest of predictability and simplicity for such a result to obtain uniformly.

The risks, strategies and considerations are especially different when a criminal action is compared to a civil proceeding. A plea bargain may be reached in order to avoid the possibly disastrous consequences of a failure to litigate the matter successfully. There is no better example of this than the present case. Petitioner faced a possible six year prison term at a time in his life when

he was unmarried and had custody of minor children. He was the sole owner and operator of six different businesses. As a consequence of his guilty plea, he was allowed to serve his 100 days of "imprisonment" in Gatlinburg, Tennessee with his family. He was also allowed while serving this term of imprisonment in a "jail type institution" to make numerous telephone calls in order to keep his businesses in operation.

Judge Merritt also examined the realities of the plea bargaining system in his dissent to the Sixth Circuit Opinion below. Noting that this system has been accepted by this Court as a necessary element of the criminal justice system, he stated:

> . . . I do not agree that the plea procedure and its attendant circumstances afforded Gray a 'full and fair opportunity' to litigate the fraud issue. Like most criminal defendants, Gray faced a powerful incentive to strike a plea bargain in which he exchanged his right to litigate the government's charges in return for a relatively lenient sentence. See *Bordenkircher v. Hayes,* 434 U.S. 357 (1978) (permitting prosecutors to reduce guilty pleas by threatening defendants with more serious charges); J. Bond, *Plea Bargaining and Guilty Pleas* (2d ed. 1982) (describing incentives to plead guilty); Klein, *Inducements to Plead Guilty: Frontier Justice Revisited,* in P. Wickman and P. Whitter, *Readings in Criminology* (1978) (describing tactics used by prosecutors to persuade defendants to plead guilty). In the United States, guilty pleas account for approximately 90% of all criminal convictions. U.S. Dep't of Justice, Nat'l Inst. of Justice, *Plea Negotiation* (1980).
>
> Widely recognized as an effective device to further the important societal goal of reducing the num-

> ber of criminal trials on crowded court dockets, see, *Bordenkircher v. Hayes,* supra, at 364 (Supreme Court 'has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty'); *Blackledge v. Allison,* 431 U.S. 63, 71 (1977) (characterizing guilty plea and concomitant plea bargain as 'important components of this country's criminal justice system'); *Santobello v. New York,* 404 U.S. 257, 261 (1971) (disposition of charges after plea discussions considered essential and highly desirable part of the criminal process), plea bargaining fundamentally alters the strategy that a defendant would otherwise pursue in responding to criminal charges.

Gray v. Commissioner, 708 F.2d 243, 248 (6th Cir. 1983) (Merritt, J., dissenting).

There are many reasons why a party may not wish to contest an issue, and these reasons may not have anything to do with the actual merits of the case. There are often temporary circumstances which would determine whether the party is willing to litigate at that particular time. Furthermore, it is a well known fact that there is a strong disincentive to defend a criminal case and a strong incentive to plead guilty. The facts inherent in the plea bargaining system cannot be ignored. As expressed in Bond's treatise *Plea Bargaining & Guilty Pleas*:

> The average defendant will receive a stiffer sentence if he goes to trial and exercises his other constitutional rights and is subsequently convicted than if he simply pleads guilty. Among all convicted defendants in federal district courts, those pleading guilty at arraignment received average sentences of less than

one year; those going to trial received average sentences from three to four years. Rather crudely put, 'sentences reflect the amount of trouble caused to all in authority by the obviously guilty defendant.' Newman, *Conviction: The Determination of Guilt or Innocence Without Trial* 216 (1966). A trial is trouble. While few if any judges admit that they penalize the defendant for exercising the right to trial by slapping him into jail for many years, they concede that the defendant who pleads guilty receives a more lenient sentence. *Dewey v. United States*, 268 F.2d 124, 128 (8th Cir. 1959) (court takes 'judicial notice of the fact that trial courts quite generally impose a lighter sentence on pleas of guilty than in cases where the accused pleaded not guilty but has been found guilty by a jury'). See also *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 Yale L.J. 204, 206-7 (1956).

* * *

. . . [T]he fact remains that defendants convicted after trial receive longer sentences than those who plead guilty. One study shows a 10% to 95% variance in punishment pursuant to guilty pleas. Ferguson, The Role of the Judge in Plea Bargaining, 15 Crim, L.Q. 26, 50-1 (1972). Whatever the precise degree of the sentence discount, the consensus is that it is substantial. Official Inducements to Plead Guilty: Suggested Morals for a Marketplace, 32 U. Chi. L.Rev. 167 (1964).

J. Bond, *Plea Bargaining & Guilty Pleas*, § 2.06[1] (1978).

The theory that a criminal conviction should only be considered as an admission against interest in a later civil case has long been supported by the law of evidence. The

Federal Rules of Evidence specifically provide that "evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, [is admissible] to prove any fact essential to sustain the judgment." *Fed. R. Evid.* 803(22). In his noteworthy treatise, Wigmore also observes that a judicial admission is limited to the cause in which it is made and is admissible in other actions, but such an admission is not conclusive upon the matter to which it related. IV *Wigmore on Evidence* § 1066 (3rd ed. 1940).

The policy of efficiently limiting litigation inherent in the rule of collateral estoppel must be balanced against the at least equally compelling policy that a party should not be deprived of one fair adversary hearing at which he can present his case. A litigant's right to one adversary hearing should not be dealt with lightly and is deserving of utmost respect considering the fact that this policy is enshrined in the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution. The traditional requirement of "actual litigation" in connection with the doctrine of collateral estoppel achieves a balance between the competing principles of efficiently limiting litigation and the right of one fair adversary hearing. A policy of actual litigation at least once before preclusion is surely not excessive.

It is, therefore, respectfully submitted that this petition for a writ of certiorari be granted.

LESLIE SHIELDS
Attorney for Petitioner

December, 28th, 1983

AFFIDAVIT

STATE OF TENNESSEE)
COUNTY OF KNOX)

I, Leslie Shields, hereby attest that 40 copies of the Petition for Writ of Certiorari in behalf of Paul F. Gray, Jr. were mailed to Mr. Alexander L. Stevas, Clerk of the Court, Supreme Court of the United States, Washington, D.C. 20543 with first-class postage prepaid on December 28, 1983, within the time specified for filing, in accordance with Rule 28.2 of the Supreme Court Rules by depositing the same in a United States post office, and I also certify that on December 28, 1983, three copies of the Petition for Writ of Certiorari were served on counsel for the Respondent by depositing the same, postage prepaid, in a United States post office addressed to Mr. Glenn L. Archer, Jr., Assistant Attorney General, and to Mr. Michael L. Paup, Chief, Appeals Division, Tax Division, Department of Justice, Washington, D.C. 20530.

LESLIE SHIELDS

APPENDIX

No. 81-1389

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAUL F. GRAY, JR.,
Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

On Appeal From the United States Tax Court.

Decided and Filed June 6, 1983

Before: ENGEL and MERRITT, Circuit Judges; BROWN, Senior District Judge.*

BROWN, Senior District Judge, delivered the opinion of the Court in which ENGEL, Circuit Judge, joined. MERRITT, Circuit Judge (pp. 8-14), filed a separate dissenting opinion.

BROWN, Senior District Judge. This is an appeal from a decision of the United States Tax Court which sustained the Commissioner's determination of certain deficiencies in the federal tax returns of appellant, Paul F.

*The Honorable Wesley E. Brown, Senior Judge, United States district Court for District of Kansas, sitting by designation.

Gray, Jr., for the years 1968, 1969, and 1970, which imposed certain fraud penalties pursuant to 26 U.S.C. § 6653(b). In particular, the Tax Court found that Gray was collaterally estopped from denying that his returns for the years in question were fraudulent, in view of his previous pleas of guilty to charges of income tax evasion for those years.

The only issue presented for review in this appeal is whether or not the Tax Court was correct in holding that Gray was collaterally estopped from denying liability for civil penalties as a result of his guilty pleas under 26 U.S.C. § 7201.

Appellant was indicted March, 1975 in the Eastern District of Tennessee on three counts of knowingly and willfully attempting to evade and defeat income taxes for the years 1968, 1969 and 1970, by submitting false returns, in violation of 26 U.S.C. § 7201.[1] Gray pled guilty to each count of the indictment and received a sentence of 18 months on Count I, two years' probation on Counts II and III, and a fine of $2,000 on each of the three counts. The sentence on Count I was suspended except for 100 days to be served in a "jail type" institution. At the time the pleas were entered Gray was aware of the fact that no disposition was being made of his civil tax liabilities.

In April, 1976, after the criminal matter was disposed of, the Commissioner issued the required statutory notices of deficiency for the taxable years 1968-1970, including ad-

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1. § *7201. Attempt to evade or defeat tax:*

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

ditional civil penalties provided by 26 U.S.C. § 6653(b),[2] in the following amounts:

Year	Deficiency	Additions
1968	$22,466.07	$11,223.03
1969	40,767.94	20,383.97
1970	39,134.47	19,567.23[3]

Gray petitioned the Tax Court for a redetermination of the asserted deficiencies, and additions to the tax. The United States filed a motion for partial summary judgment, alleging that Gray was collaterally estopped, by his plea of guilty in the criminal tax prosecution, from denying liability for civil penalties under Section 6652(b). In opposing the motion, Gray contended that his pleas were not conclusive in regard to civil penalties, and he sought partial summary judgment to the effect that any deficiency should be limited to the amounts alleged in the criminal indictment, with civil fraud penalties to be limited to 50% of those figures.

On November 27, 1979, the Tax Court granted the government's motion for partial summary judgment, and denied Gray's motion, ruling that Gray was "collaterally estopped from denying that parts of the underpayments of income tax for the taxable years . . . are due to fraud."

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2. § 6653. *Failure to pay tax.*

* * * *

(b) *Fraud.*—If any part of any underpayment . . . of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment . . . .

3. In addition to the taxable years 1968-1970, the years covered by the criminal indictment, the Commissioner issued a separate statutory notice finding deficiencies, with additions, for the tax year 1972. The 1972 tax claim has been settled and is not an issue in this appeal.

Gray next filed in the criminal case in Tennessee a petition for a Writ of Error Coram Nobis for the purpose of vacating and setting aside his convictions, and to permit him to withdraw his pleas of guilty in that proceeding. The petition was denied and this decision was affirmed by this Circuit, without published opinion, *Paul F. Gray, Jr. v. United States of America,* No. 81-5436 (6th Cir. July 16, 1981). In that appeal, a panel of this court determined that the collateral estoppel effect of a guilty plea in a later civil tax case is a collateral consequence of the guilty plea, and that it was therefore unnecessary for the district court to have specifically advised Gray of the collateral consequences of his plea. It was further held that there was no evidence that the United States Attorney had misled Gray in any respect regarding the separate issue of his civil tax liabilities.[4]

After further hearing in the Tax Court, the parties agreed to the Commissioner's computations, and under stipulated facts, it was found that Gray had additional taxable income of $53,543.83, $69,736.76, and $106,141.66, respectively for the years 1968, 1969, and 1970. From these figures, the Tax Court determined that tax deficiencies for those years were in the sums of $19,534.11,

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4. In this appeal, the Circuit stated:

"A guilty plea must conform to the constitutional standards of voluntariness because it has the effect of a conviction and waiver of the constitutional right to a jury trial. . . In order for the guilty plea to be voluntarily made the defendant must be made aware of all direct consequences of his plea . . . the courts have held that the defendant need not be advised of the collateral consequences of his plea. . . .

"Since the collateral estoppel effect of a guilty plea in a subsequent civil tax case constitutes a collateral consequence of the guilty plea . . . it was unnecessary for the district court to have advised the defendant of the civil ramifications of his guilty plea. Nor is there any evidence in the record to indicate that the U. S. Attorney's statement misled the defendant with respect to the separate issue of civil liability."

$27,594.80, and $38,054.96. Additions to these taxes under the provisions of § 6653(b) were found to be in the amounts of $9,767.06, $13,979.40 and $19,027.48.

In this appeal, Gray contends that it was error to apply the doctrine of collateral estoppel because estoppel operates only upon matters and questions actualy litigated. Appellant claims that his guilty pleas in the criminal case, were like a consent decree in a civil case, and not an adjudication on the merits of the fraud issue.

While Gray concedes that there are federal cases which would permit the application of collateral estoppel in this instance, he argues that such cases are distinguishable, and not applicable to his situation. He further contends that such cases are not binding upon this court, that they are in conflict with "the weight of state authorities on the issue," and that an application of collateral estoppel here would conflict with the holding of the Supreme Court in *United States v. International Building Co.*, 345 U.S. 502, 97 L.Ed. 1182 (1953).

In *International Building,* deficiencies were assessed against the corporate taxpayer for the years 1933, 1938, and 1939, because of a determination that taxpayer had used an improper basis of depreciation for certain property. By a joint stipulation, the deficiencies were abated and the Tax Court entered decisions that there were no deficiencies for those years. In 1948, the Commissioner assessed deficiencies in taxes for the years 1943, 1944, and 1945, again challenging the basis for depreciation used by taxpayer. After paying the deficiencies and suing for refund, the taxpayer claimed that the prior decisions regarding taxable years 1933, 1938 and 1939 were *res judicata* as to the question of the proper basis for depreciation. In determining that the prior decision was not binding, the

court found that it was not clear that the merits of the depreciation dispute had been determined in the first case.

The *International Building* case is clearly distinguishable from Gray's situation. The record establishes that the District Court fully examined appellant with respect to his understanding of the charges contained in the indictment, and Gray affirmatively stated that he had indeed filed false tax returns, and that he had done so, with the intent to evade the payment of taxes.[5] The record is clear that Gray voluntarily chose to plead guilty to the charges, and a forthright judicial determination was made that he was guilty as charged in each instance.

A guilty plea is as much a conviction as a conviction following jury trial. The elements of criminal tax evasion and civil tax fraud are identical. See *Hicks Co., Inc. v. C.I.R.*, 470 F.2d 87, 90 (1 Cir. 1972); *Moore v. United States*, 360 F.2d 353, 356 (4 Cir. 1965, as modified), *cert. den.* 385 U.S. 1001 (1967).

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5. "THE COURT: Now, Mr. Gray, let me go over this with you and make certain it would be proper to permit you to enter pleas of guilty upon the three counts in the indictment in this case.

Do you understand that in the first count it is charged that for the calendar year 1968 that you filed a false income tax return, that you did so with intent to evade the payment of taxes and reported income of twenty-eight thousand some odd dollars whereas your taxable income was in the sum of sixty-two thousand and some odd dollars, do you understand that is what you are charged with in this first count?

MR. GRAY: Yes, sir.

THE COURT: Well, did you file a false tax return as charged in the first count of the indictment?

MR. GRAY: Yes, sir.

THE COURT: And at the time you did so did you do so with the intent to evade the payment of the tax as charged in the first count?

MR. GRAY: Yes Sir."

Numerous federal courts have held that a conviction for federal income tax evasion, either upon a plea of guilty, or upon a jury verdict of guilt, conclusively establishes fraud in a subsequent civil tax fraud proceeding through application of the doctrine of collateral estoppel. See *Fontneau v. United States*, 654 F.2d 8, 10 (1 Cir. 1981) (guilty plea); *Plunkett v. C.I.R.*, 465 F.2d 299, 305-307 (7 Cir. 1972) (guilty plea); *Neaderland v. C.I.R.*, 424 F.2d 639, 642 (2d Cir. 1970) *cert. den.* 400 U.S. 827 (1970); *Moore v. United States, supra*, 360 F.2d 353 at 355-356 (conviction following trial); *Amos v. C.I.R.*, 360 F.2d 358 (4 Cir. 1965) *affirming* 43 T.C. 50; *Armstrong v. United States*, 354 F.2d 274, 291 (Ct. Cl. 1965) (conviction following trial); *Tomlinson v. Lefkowitz*, 334 F.2d 262, 264-265 (5 Cir. 1964) *cert. den.* 379 U.S. 962 (1965) (conviction following trial.) See also, *Arctic Ice Cream Co. v. Commissioner*, 43 T.C. 68, 75 (1964) and the recent decisions in *Acker v. United States*, (N.D. Ohio 1981) 519 F. Supp. 178, 182, and *Considine v. United States*, 683 F.2d 1285 (9 Cir. 1982).

In the face of the foregoing authorities, appellant's citation of state cases is not persuasive. Indeed, he recognizes that "most of the federal cases take the opposite position" to that which he urges in this appeal.[6] We conclude that appellant's contention that he has been denied his day in court with respect to the issue of fraud is without merit.

The judgment of the Tax Court is AFFIRMED.

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6. In supplementing his brief, appellant refers us to *Kreps v. C.I.R.*, 351 F.2d 1 (2 Cir. 1965), which, in dictum, refers to a criminal conviction as being "evidence" of fraud. We find this case to be distinguishable and of no persuasive force.

MERRITT, Circuit Judge, dissenting. The principles of *res judicata* and collateral estoppel and the subsidiary doctrines of claim preclusion and issue preclusion, *see generally Restatement of Judgment (Second)* (1982) reflect a judicial purpose to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). These are sound policy objectives, but before deciding whether to give preclusive effect to a prior criminal judgment, we should consider any countervailing factors that might outweigh the salutary effects of a broad preclusion rule.

The Court holds for the first time in this Circuit that a taxpayer's plea of guility to tax fraud charges precludes him in subsequent civil proceedings from contesting liability for fraud penalties assessed on tax deficiencies for the period associated with those charges. Two federal circuit courts have upheld the application of collateral estoppel against taxpayers who—like the petitioner in the instant case—had pleaded guilty to tax evasion charges under 26 U.S.C. § 7201. *See Fontneau v. United States*, 654 F.2d 8 (1st Cir. 1981); *Plunkett v. Commissioner*, 465 F.2d 299 (7th Cir. 1972). Gray contends, however, that both of these defendants are distinguishable from his case because, unlike the defendants in *Fontneau* and *Plunkett*, he did not understand and was not told that his guilty plea would have collateral consequences in subsequent civil proceedings. The majority implicitly rejects this distinction by observing that this Court has already held that the district judge who took Gray's plea did not have to advise him of these collateral consequences in order to ensure the plea's voluntariness. (*Ante* at p. 4, n.4)

Yet, whether Gray's plea was voluntary as a matter of fifth amendment due process is a very different question from whether he should now be estopped from litigating the issue of the origin of his tax deficiencies under 26 U.S.C. § 6653(b). In *Allen v. McCurry, supra,* 449 U.S. at 94-95, the Supreme Court reiterated the standards governing the use of collateral estoppel, recognizing that the doctrine may apply "once a court has decided an issue of fact or law necessary to its judgment . . . [but] cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." (citing *Montana v. United States,* 440 U.S. 147, 153 (1979); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313, 328-29 (1971). The issue in Gray's case is thus whether his guilty plea constitutes an adjudication on the fraud question, and if so, whether the plea procedure afforded him a "full and fair opportunity" to litigate that question.

Although § 85 of the *Second Restatement of Judgments* specifically provides for the preclusive effect of a criminal judgment in subsequent civil proceedings, a comment following that section notes that this rule "presupposes that the issue in question was actually litigated in the criminal prosecution." *Restatement of Judgments (Second)* § 85, Comment b (1982). Thus, the comment concludes that § 85 does not apply to a guilty plea "because the issue has not actually been litigated." *Id.* Also espousing this view, Professor Moore states:

> A judgment based upon the parties' consent provides no reasonable basis for inference that the parties litigated, or the court adjudicated, any issue — it indicates the contrary. Since the rationale of collateral estoppel requires litigation and adjudication to make the issues conclusive in subsequent litigation, there is

> no more basis for applying the doctrine to a conviction by consent than to a civil judgment by consent, and generally this civil judgment does not have collateral estoppel effect.

1B J. Moore, *Moore's Federal Practice* ¶ 0.418[1] at 2707-08 (2d ed. 1982). *Accord* C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* §4474, at 760 (1981) ("Conviction upon a plea of guilty does not rest on actual adjudication or determination of any issue. Just as issue preclusion should not rest on civil judgments by consent, stipulation or default, so it should not rest on a plea of guilty.")

Despite the view of these commentators and the American Law Institute that a guilty plea conviction does not represent an adjudication of the issues in the case, the majority refuses to distinguish between guilty pleas and jury trial convictions for collateral estoppel purposes. In reaching its decision, the majority observes that "[a] guilty plea is as much a conviction as a conviction following jury trial." *Ante*, at 6. While clearly correct as a statement of substantive law, this observation begs the essential question that we confront in this case: as a matter of judicial policy, should the courts give preclusive effect to guilty pleas?

Even assuming *arguendo* that—contrary to the consensus of the legal commentators discussed above—a guilty plea conviction *does* constitute a formal adjudication, I do not agree that the plea procedure and its attendant circumstances afforded Gray a "full and fair opportunity" to litigate the fraud issue. Like most criminal defendants, Gray faced a powerful incentive to strike a plea bargaining in which he exchanged his right to litigate the government's charges in return for a relatively lenient sentence.

See Bordenkircher v. Hayes, 434 U.S. 357 (1978) (permitting prosecutors to reduce guilty pleas by threatening defendants with more serious charges); J. Bond, *Plea Bargaining and Guilty Pleas* (2d ed. 1982) (describing incentives to plead guilty); Klein, *Inducements to Plead Guilty: Frontier Justice Revisited,* in P. Wickman and P. Whitter, *Readings in Criminology* (1978) (describing tactics used by prosecutors to persuade defendants to plead guilty). In the United States, guilty pleas account for approximately 90% of all criminal convictions. U.S. Dep't of Justice, Nat'l Inst. of Justice, *Plea Negotiation* (1980).

Widely recognized as an effective device to further the important societal goal of reducing the number of criminal trials on crowded court dockets, *see, e.g., Bordenkircher v. Hayes, supra,* at 364 (Supreme Court "has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty"); *Blackledge v. Allison,* 431 U.S. 63, 71 (1977) (characterizing guilty plea and concomitant plea bargain as "important components of this country's criminal justice system"); *Santobello v. New York,* 404 U.S. 257, 261 (1971) (disposition of charges after plea discussions considered essential and highly desirable part of the criminal process), plea bargaining fundamentally alters the strategy that a defendant would otherwise pursue in responding to criminal charges. Acknowledging this effect, Justice Roger Traynor found that the additional considerations presented by plea bargaining render collateral estoppel inappropriate in guilty plea settings:

> When a plea of guilty has been entered in the prior action, no issues have been "drawn into controversy" by a "full presentation" of the case. It may reflect only a compromise or a belief that paying a fine is more ad-

> vantageous than litigation. Considerations of fairness to civil litigants and regard for the expeditious administration of criminal justice . . . combine to prohibit the application of collateral estoppel against a party who, having pleaded guilty to a criminal charge, seeks for the first time to litigate his cause in a civil action.

Teitelbaum Furs, Inc. v. Dominion Insurance Co., 58 Cal. 2d 601, 605-06, 375 P.2d 439, 441 (1962).

The majority's collateral estoppel rule permits the government to whipsaw tax fraud defendants by first inducing them to enter guilty pleas through attractive plea bargain offers and then suing them in civil proceedings where the taxpayers cannot contest their liabiltiy. A defendant's decision whether to plead guilty is often difficult when limited to criminal law considerations. I believe that the appending of civil consequences unfairly complicates the criminal defendant's position, and that for purposes of plea bargaining, the criminal process should stand alone. As in other settings where the government invites the cooperation of criminal defendants, the furthering of society's interest in expediting its judicial process should not entitle the government to reap collateral dividends. *Cf.* Note, *Standoff Situations and Fifth Amendment,* 91 YALE L. J. 344 (1981) (desirability of having police negotiate surrenders in hostage situations should not supersede suspects' fifth amendment rights).

The unfairness that Justice Traynor discusses is compounded by the rule's asymmetrical orientation. Because of the government's enhanced burden of proof in criminal cases, acquittal at the criminal stage will not create any estoppel against the government at the civil level. Under the doctrine of mutuality of parties that formerly governed

the application of collateral estoppel, "neither party could use a prior judgment as an estoppel against the other unless both parties were bound by the judgment." *Parklane Hosiery v. Shore,* 439 U.S. 322, 326-27 (1979) (citing *Bigelow v. Old Dominion Copper Co.,* 225 U.S. 111, 127 (1912). Both parties thus enjoyed equal access to the judgment for collateral estoppel purposes. Although recent federal and state cases display a distinct trend repudiating the mutuality doctrine, *Parklane Hosiery Co. v. Shore, supra,* at 326-27; 1B J. Moore, *Moore's Federal Practice* ¶ 412 [1] at 1804 (2d ed. 1982) (Supp.), these cases do not discuss the problem of asymmetary resulting from different burdens of proof. On the contrary, they involve purely civil settings, which do not engender the same "settlement" inducements that characterize plea negotiations. This qualitative difference between civil and criminal cases convinces me that the lack of mutuality assumes critical importance in tax fraud cases.

Of course, under the majority's rule, taxpayers facing criminal charges would appear to have the benefit of collateral estoppel if they first prevailed against the government in civil proceedings. *See Yates v. United States,* 354 U.S. 298, 335-36 (1957) (adverse findings in civil proceeding may prevent government from relitigating issue in criminal prosecution). However, the government follows a policy which obviates such a turn of events. It simply prosecutes the criminal case first, a policy that ensures the government's advantageous position regarding collateral estoppel. This observation highlights yet another negotiate ramification of the majority's rule. In establishing the procedures governing conventional tax litigation, Congress has decided that the taxpayer who wishes to challenge the Commissioner's assessment may

choose to sue in the Tax Court, the Court of Claims, or a federal district court. *See* B. Bittker, *Federal Taxation of Income, Estates and Gifts* ¶ 115-1, at 115-2-115-4 (1981) (discussing various factors that influence taxpayer's choice of forum in deficiency cases). The majority's rule effectively eliminates this choice from the arsenal of the taxpayer in Gray's position, for it transfers the initiative to the government and restricts litigation of tax liability to the district courts conducting the criminal proceedings. Note, *Collateral Estoppel in Civil Tax Fraud Cases Subsequent to Criminal Conviction,* 64 MICH. L. REV. 317, 323 (1965).

The benefits likely to accrue from the majority's position are meager. As noted above, the policy of precluding litigation following judgment embodies the goals of conserving judicial resources, preventing inconsistent decisions, and insulating parties from the harassment of multiple lawsuits. Of these three objectives, only the first is even arguably furthered by this Court's holding today. But application of collateral estoppel to the fraud issue in civil tax cases will not markedly increase the yield of judicial efficiency. Extending only to the question of liability for tax fraud, this estoppel will not establish the precise amount of a taxpayer's deficiency attributable to the fraud, an issue that the taxpayer will remain free to contest in the civil forum. *See* Note, *Collateral Estoppel in Civil Tax Fraud Cases Subsequent to Criminal Conviction,* 64 MICH. L. REV. 317, 322 (1965).

Finally, this Court need not adopt so drastic a measure in order to protect the government's right to use guilty pleas in civil cases. Like any judicial admission, a guilty plea would be admissible in court. Federal Rule of Evidence 803(22) specifically establishes the unqualified ad-

missibility of guilty pleas in civil cases.[1] I would rely on the solution provided by the Federal Rules of Evidence making the plea admissible on the issue of civil liability, rather than a solution that takes unfair advantage of the taxpayer's decision to plead guilty, a decision made perhaps only to avoid the risks and uncertainty of a criminal trial and of years of imprisonment, a decision made without knowledge that the taxpayer, after paying his fine, would automatically lose his property as well in a later civil proceeding where he would be barred from litigating the issue of civil liability.

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1. The same rule also explicitly excludes pleas of *nolo contendere* from the scope of this exception to the hearsay rule. Such pleas are also not considered admissions, hence the distinction between pleading guilty and pleading *nolo contendere*. *See Restatement of Judgments (Second)* § 85, Comment b (1982).

(Filed June 6, 1983)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 81-1389

PAUL F. GRAY, JR.,
Petitioner-Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Before: ENGEL and MERRITT, Circuit Judges; and WESLEY E. BROWN, Senior District Judge.

JUDGMENT

ON APPEAL from a decision of the Tax Court of the United States.

THIS CAUSE came on to be heard on the transcript of record from the said Tax Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the decision of the said Tax Court in this cause be and the same is hereby affirmed.

Each party to bear its own costs on this appeal.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk
/s/ John P. Hehman
Clerk

Issued as Mandate: October 10, 1983

(Filed September 30, 1983)

No. 81-1389

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAUL F. GRAY, JR,
Plaintiff-Appellee,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Defendant-Appellant.

ORDER

Before: ENGEL and MERRITT, Circuit Judges; and BROWN,* Senior District Judge.

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the plaintiff-appellee has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court finding no issues presented which have not been previously considered,

IT IS ORDERED that the petition for rehearing with suggestion for rehearing en banc be and it is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

*The Honorable Wesley E. Brown, Senior District Judge for Kansas, sitting by designation.

T. C. Memo. 1981-1

UNITED STATES TAX COURT

PAUL F. GRAY, JR. and WILMA GRAY,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 6128-76. Filed January 5, 1981.

H. Wayne Grant, Perry Shields, and *Leslie Shields,* for the petitioners.

Roy R. Allison, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

SCOTT, *Judge*: Respondent determined deficiencies in petitioners' income tax and additions to tax under section 6653(b), I.R.C. 1954,[1] for the years and in the amounts as follows:

Year[2]	Deficiencies	Additions to Tax Under Sec. 6653(b), I.R.C. 1954
1968	$22,466.07	$11,223.03
1969	40,767.94	20,383.97
1970	39,134.47	19,567.23

1. Unless otherwise indicated, all statutory references are to the Internal Revenue Code of 1954, as amended and in effect in the years in issue.

2. In a separate statutory notice of deficiency, respondent determined a deficiency in tax and an addition to tax for pe-

(Continued on following page)

The issue for decision in this case is the amount of deficiencies in tax and additions to tax due from petitioners for each of the years 1968, 1969, and 1970.[3]

FINDINGS OF FACT

The facts in this case with respect to the amount of petitioners' taxable income in each of the years here in issue have been stipulated by the parties. The Court finds these facts as agreed to by the parties.

Paul F. Gray, Jr. (petitioner), resided in Chattanooga, Tennessee, at the time of the filing of his petition in this case. He filed a joint Federal income tax return with his wife, Wilma, for each of the calendar years 1968,

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Footnote continued—

titioners' calendar year 1972. Originally the year 1972 was included in a single petition with the years 1968, 1969, and 1970. However, on October 29, 1980, the parties filed a joint motion to sever the year 1972 from the years 1968, 1969, and 1970, and assigned a separate docket number to that case. By order dated October 29, 1980, this motion was granted and the year 1972 was severed from the above-entitled case and assigned docket number 22381-80. The parties disposed of the issues involved for the year 1972 by settlement and the Court on December 19, 1980, entered a decision in docket number 22381-80.

3. The issue of whether petitioner Paul F. Gray, Jr., was liable for an addition to tax for fraud under sec. 6653(b) was disposed of for each of the years 1968, 1969, and 1970 by an order dated November 27, 1979, granting respondent's motion for partial summary judgment and holding that petitioner Paul F. Gray, Jr., is collaterally estopped from denying that parts of the underpayments of income tax for the taxable pears 1968, 1969, and 1970 are due to fraud. Respondent has conceded that Wilma Gray was an innocent spouse under sec. 6013 and by reason of those provisions is not liable for any deficiencies in 1968, 1969, and 1970. It follows that Wilma Gray is not liable for any additions to tax under sec. 6653(b). Furthermore, respondent offered no evidence at the trial to show any fraud on the part of Wilma Gray. At the trial of this case petitioner moved that the Court reconsider its order granting respondent's motion for partial summary judgment. This motion was orally and by written order dated October 28, 1980, denied.

1969, and 1970 with the Director, Internal Revenue Service Center, Chamblee, Georgia.

The following schedule shows petitioner's assets and liabilities at the end of each of the years 1967 through 1970 and his net worth increases, corrected taxable income, taxable income reported, and additional tax income:

	Dec 31, 1967	Dec 31, 1968	Dec 31, 1969	Dec 31, 1970
Assets				
Cash on Hand	$ 70,000.00	$ 70,000.00	$ 48,000.00	$ 48,000.00
Cash in Banks	5,312.57	2,137.22	1,168.43	2,202.67
U.S. Treasury Notes	30,000.00	30,000.00	30,000.00	- 0 -
United Bank Stock	- 0 -	- 0 -	- 0 -	12,500.00
Chattanooga Trans Co. Stock	500.00	500.00	500.00	500.00
Inventory	- 0 -	- 0 -	1,172.79	1,263.50
Notes Receivable	13,500.00	5,000.00	- 0 -	- 0 -
Real Estate	103,627.89	106,514.06	156,183.58	402,137.64
Buildings	157,500.00	300,978.92	453,546.38	648,933.19
Furniture and Fixtures	2,862.95	14,638.66	59,838.96	67,536.26
Machinery and Equipment	- 0 -	18,216.12	19,749.51	19,749.51
Improvements	866.00	16,090.01	37,637.37	55,877.37
Automobiles	6,168.00	6,168.00	6,150.00	6,029.43
Total Assets	$390,337.41	$570,242.99	$813,947.02	$1,264,729.57

	Dec 31, 1967	Dec 31, 1968	Dec 31, 1969	Dec 31, 1970
Liabilities				
Loans	$ 93,219.59	$194,218.18	$357,018.12	$694,807.31
Accts Payable	- 0 -	168.89	10,503.84	8.74
Depreciation Reserve	7,920.46	19,279.34	51,293.26	97,278.52
Total Liabilities	101,140.05	213,666.41	418,815.22	792,094.57
Net Worth	$289,197.36	$356,576.58	$395,131.80	$472,635.00
Prior Years Net Worth		$289,197.36	$356,576.58	$395,131.80
Increase in Net Worth		67,379.22	38,555.22	77,503.20
Plus personal Living Exp.		20,501.22	35,484.02	18,372.55
Adjusted Gross Income		87,880.44	74,039.24	95,875.75
Less: Itemized Deductions		2,062.54	3,185.60	3,601.16
Exemptions		4,200.00	4,200.00	4,375.00
Corrected Taxable Income		81,617.90	66,653.64	87,899.59
Less: Taxable Income per return		28,074.07	(3,083.12)	(18,242.07)
Additional Taxable Income		$ 53,543.83	$ 69,736.76	$106,141.66

Petitioner is the same person who was the defendant in the criminal case of *United States v. Paul F. Gray, Jr.*, Docket No. CR-1-75-8, in the United States District Court for the Eastern District of Tennessee. The indictment filed in that case on March 24, 1975, charged in separate counts for 1968, 1969, and 1970 that petitioner wilfully and knowingly attempted to evade and defeat a large part of the income taxes due and owing by him for those years to the United States by submitting false and fraudulent returns in violation of section 7201. Petitioner entered a plea of guilty to each of the charges set forth in this indictment and on June 17, 1975, the United States District Court for the Eastern District of Tennessee entered a judgment of conviction of petitioner on each of the counts to which he pled guilty.

On October 26, 1979, respondent filed a motion for partial summary judgment alleging that petitioner, by reason of his conviction under section 7201, was collaterally estopped from denying in this case that he wilfully filed false and fraudulent income tax returns for each of the years 1968, 1969, and 1970 with the intent to evade and defeat a part of the taxes due and owing by him for those years and that by reason of such fraud a part of the underpayment of petitioner's tax for each of those years is due to fraud within the meaning of section 6653(b). The determination made by the order of this Court dated November 27, 1979, granting respondent's motion for partial summary judgment still stands in this case since petitioner's motion to reconsider that order was denied.[4]

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4. On October 14, 1980, petitioner filed with the United States District Court for the Eastern District of Tennessee a "Motion in the Form of a Petition by the Defendant for a Writ of Error Coram Nobis Vacating and Setting Aside His Conviction and Permitting Him to Withdraw His Pleas of Guilty." At

(Continued on following page)

Respondent's determination of deficiencies for each of the years 1968, 1969, and 1970 was based on a net worth computation. Petitioner in the petition alleged many errors in this computation. However, the parties have now agreed to all elements of the net worth computation and we have set forth above all elements of this agreed computation with the resulting increases in the taxable income as reported by petitioners.

OPINION

Since all factual aspects of the net worth computation have been agreed to, the amount of tax due on the basis of the resulting net income is a matter of computation under Rule 155.

Since we have refused to reconsider the order dated November 27, 1979, granting respondent's motion for partial summary judgment, we hold that petitioner is liable for the additions to tax for fraud under section 6653(b) for each of the years 1968, 1969, and 1970.

Decision will be entered under Rule 155.

Footnote continued—

the time of the trial of this case on October 28 and 29, 1980, no action had been taken by the Court on this motion. Subsequently, the Court was informed that on November 10, 1980, this motion was denied by the District Court and that petitioner filed a notice of appeal from that denial to the United States Court of Appeals for the Sixth Circuit on November 20, 1980.

(Filed January 19, 1982)

SUPREME COURT OF THE UNITED STATES

No. 81-615

Paul F. Gray, Jr.,
Petitioner,

v.

United States.

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Sixth Circuit, No. 80-5436.

ON CONSIDERATION of the petition for a writ of certiorari herein to the United States Court of Appeals for the Sixth Circuit.

IT IS ORDERED by this Court that the said petition be, and the same is hereby, denied.

January 11, 1982

(Filed July 16, 1981)

No. 80-5436

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAUL F. GRAY, JR.,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

ORDER

Before: JONES, Circuit Judge; CECIL & CELEBREZZE, Senior Circuit Judges.

The defendant-appellant, Paul F. Gray, Jr., was indicted in 1975 for attempting to evade and defeat income taxes for the years 1968, 1969 and 1970 in violation of Sec. 7201 of the Internal Revenue Code. He initially pled not guilty to all counts.

Subsequently the defendant offered to plead guilty to all counts provided the court accepted his pleas and approved a plea bargain which had been worked out with the U.S. Attorney. At the hearing the U.S. Attorney announced "that the matters we are attempting to reach a disposition of is the criminal case alone, it makes no disposition of the civil tax liability of Mr. Gray and he should understand that." The trial court accepted the pleas and approved the plea bargain. The defendant was sentenced accordingly and has complied with the terms of his sentence.

At a later date, the defendant received a deficiency notice asserting that he owed a fraud penalty under Sec. 6653(b) of the Internal Revenue Code for each of the years covered by the indictment. The defendant petitioned the Tax Court to contest the imposition of the civil fraud penalties. The Tax Court concluded that the defendant was collaterally estopped from denying that he was liable for civil fraud penalties because of his guilty pleas in the criminal matter. The defendant then filed a motion with the trial court to vacate his conviction and to withdraw his guilty pleas. When the district court denied this motion without a hearing the defendant filed this appeal.

A guilty plea must conform to the constitutional standards of voluntariness because it has the effect of a conviction and waiver of the constitutional right to a jury trial. *See Brady v. United States*, 397 U.S. 742 (1970). In order for the guilty plea to be voluntarily made the defendant must be made aware of all direct consequences of his plea. *Kercheval v. United States*, 274 U.S. 220 (1927); *United States v. Wolak*, 510 F.2d 164 (6th Cir. 1975). This principle was embodied in former Rule 11 of the *Federal Rules of Criminal Procedure*, which required the courts to inform the defendant of the "consequences of the plea." The courts have consistently construed this to mean that they must inform the defendant of the *direct* consequences of his plea. Conversely, the courts have held that the defendant need not be advised of the collateral consequences of his plea. *Fruchtman v. Kenton*, 531 F.2d 946 (9th Cir. 1976), *cert. denied*, 429 U.S. 895 (1976); *Cuthrell v. Director, Patuxent Institution*, 475 F.2d 1364 (4th Cir. 1973), *cert. denied*, 414 U.S. 1005 (1973); *United States v. Miss Smart Frocks*, 279 F. Supp. 295 (S.D. N.Y. 1968).

Since the collateral estoppel effect of a guilty plea in a subsequent civil tax case constitutes a collateral consequence of the guilty plea, *see United States v. Miss Smart Frocks, supra,* it was unnecessary for the district court to have advised the defendant of the civil ramifications of his guilty plea. Nor is there any evidence in the record to indicate that the U.S. Attorney's statement misled the defendant with respect to the separate issue of civil liability.

Accordingly, the decision of the District Court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman

ISSUED AS MANDATE: August 7, 1981

COSTS: NONE

(Filed August 14, 1981)

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF TENNESSEE

CR. NO. 1-75-8

UNITED STATES OF AMERICA

-vs-

PAUL F. GRAY, JR.

ORDER ON MANDATE

The defendant, PAUL F. GRAY, JR., having appealed to the United States Court of Appeals for the Sixth Circuit from the order entered herein on November 10, 1980, denying his motion for writ of error corum nobis vacating and setting aside his conviction and permitting him to withdraw his pleas of guilty, and the United States Court of Appeals for the Sixth Circuit having entered its order on the 16th day of July, 1981, issued as Mandate on August 7, 1981, and received and filed herein by the Clerk on the 10th day of August, 1981, wherein the decision of the District Court was affirmed;

Now, therefore, upon Mandate of the United States Court of Appeals for the Sixth Circuit dated August 7, 1981, and received and filed herein by the Clerk on the 10th day of August, 1981, it is ORDERED AND ADJUDGED by this Court that the decision of the Court entered herein

on November 10, 1980, be and the same is hereby made final.

ENTER:

/s/ Frank W. Wilson
United States District Judge

APPROVED:

John H. Cary
United States Attorney

By: /s/ John C. Cook
John C. Cook
Assistant U. S. Attorney

(Filed November 10, 1980)

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF TENNESSEE,
SOUTHERN DIVISION

CR-1-75-8

UNITED STATES OF AMERICA

-vs.-

PAUL F. GRAY, JR.

MEMORANDUM

This is a criminal matter in which the defendant, Paul F. Gray, Jr., has filed a motion in the form of a petition for a writ of error *coram nobis,* 28 U.S.C. § 1651(a), seeking an order vacating and setting aside his judgment of conviction on a three-count indictment for income tax evasion. The matter is before the Court upon the defendant's motion (Court File #19) and a motion on behalf of the United States (Court File #20) to dismiss the defendant's motion on the grounds that its allegations would not entitle the defendant to any relief. Also before the Court are the transcripts of the rearraignment and judgment proceedings held upon May 6 and June 17, 1975, respectively.

A historical review of the case is in order before the Court addresses the merits of the motion. The defendant was indicted in March 1975 under Section 7201 of the Internal Revenue Code, 28 U.S.C. § 7201, on three counts of attempting to evade the payment of federal income taxes

due for the years 1968, 1969 and 1970. Following arraignment upon April 9, 1975, at which time the defendant pleaded not guilty to all counts he was rearraigned upon May 6, 1975, at which time he changed his pleas to guilty as to each count. The record reflects that throughout these proceedings the defendant was represented by retained counsel who had secured a plea bargain arrangement with the United States Attorney. The agreement provided for a sentence of 18 months, which would be suspended except for 100 days to be served in a jail type institution, a total of $6,000 in fines and two years' probabation to be served consecutive to the 100-day term. The record further indicates that the judgment of conviction was entered in accordance with the United States Attorney's recommendation, that the sentence was served and that the fines were paid. Thereafter upon April 6, 1976, the Commissioner of Internal Revenue sent the defendant a deficiency notice in which the United States asserted that the defendant was civilly liable for the three tax years in question in the sum of $51,174.23. The defendant has resisted the payment of that amount by filing a petition in the United States Tax Court seeking a review of his liability. The Commissioner has apparently moved for partial summary judgment alleging that the defendant is collaterally estopped from denying liability due to his guilty pleas in this court. As a result the defendant has now appeared before this Court seeking to withdraw his pleas of guilty and to have his conviction vacated and set aside by means of a writ of error *coram nobis*.

The writ of error *coram nobis* is an extraordinary writ. The Court's authority to issue such a writ stems from the All Writ Statute, 28 U.S.C. § 1651(a). Though the jurisdiction of the Court to grant the writ is of limited scope, the writ is sufficient to invoke the Court's jurisdic-

tion to set aside its judgment of conviction even when the sentence has been fully served. *United States v. Norman,* 391 F.2d 212 (6th Cir. 1968). However, before *coram nobis* relief will be granted the record must disclose errors of fact at the trial which are "of such a fundamental kind as to render the proceeding itself irregular or invalid or to require the vacation of the conviction and sentence in order to achieve justice . . . ." *United States v. Cariola,* 323 F.2d 180, 187 (3rd Cir. 1963). There exists a presumption that the proceedings were correct and the burden rests upon the accused to show otherwise. *United States v. Morgan,* 346 U.S. 502, 512, 74 S.Ct. 247, 98 L.Ed. 248, 257 (1954); *see generally* ANNOT. 38 A.L.R. Fed. 617 (1978).

The sole basis for the defendant's petition is the contention that the United States through the Commissioner of Internal Revenue has breached the plea bargain agreement between the defendant and the United States Attorney by seeking to recover the amount for which the defendant is civilly liable and using the doctrine of collateral estoppel to preclude the defendant's denial of such civil liability. At the defendant's rearraignment the United States Attorney made the following statement with respect to any potential future civil tax liability:

> "In addition to that, I should have stated for the Court's elucidation that Mr. Gray should have been advised through his attorneys, and I am sure he has likewise, that the matter that we are attempting to reach a disposition of is the criminal case alone, it makes no disposition of the civil tax liability of Mr. Gray and he should understand that."

P. 10, Transcript of Rearraignment, May 6, 1975. The defendant has asserted that the use of collateral estoppel in

the tax court case is an "automatic disposition" of his right to deny civil liability and that such disposition is in violation of the statement that the plea bargain agreement made no disposition of civil tax liability. The Court is of the opinion that the United States Attorney's statement was merely a gratuitous warning that the criminal proceeding did not purport to involve the separate issue of civil liability. It is further the Court's opinion that the defendant's interpretation of the United States Attorney's statement does not merit the issuance of a writ of error *coram nobis*. *See United States v. Miss Smart Frocks, Inc.*, 279 F.Supp. 295 (S.D.N.Y. 1968).

Accordingly, the motion to dismiss filed on behalf of the United States will be granted.

An appropriate order will enter.

/s/ Frank W. Wilson
United States District Judge

(Filed November 10, 1980)

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF TENNESSEE,
SOUTHERN DIVISION

CR-1-75-8

UNITED STATES OF AMERICA

-vs.-

PAUL F. GRAY, JR.

ORDER

This case is before the Court upon the defendant's motion in the form of a petition for a writ of error *coram nobis* seeking to set aside the judgment of conviction entered herein upon June 17, 1975 on the defendant's pleas of guilty to a three-count indictment charging income tax evasion. The Court having entered a memorandum on the motion, this order is entered in accordance therewith.

It is accordingly ORDERED that the defendant's motion in the form of a writ of error *coram nobis* be and the same is hereby denied.

ENTER:

/s/ Frank W. Wilson
United States District Judge

IN THE
DISTRICT COURT OF THE UNITED STATES
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

Criminal-1-75-8
Income Tax Evasion
Counts 1, 2 and 3

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PAUL F. GRAY, JR.,
Defendant.

APPEARANCES:

For the United States of America:

JOHN L. BOWERS, JR., ESQ., United States Attorney, Federal Building, Knoxville, Tennessee.

RAY H. LEDFORD, ESQ., Assistant United States Attorney, Federal Building, Chattanooga Tennessee.

For the Defendant:

JERRY H. SUMMERS, ESQ., 500 Lindsay Street, Chattanooga, Tennessee.

H. WAYNE GRANT, ESQ., of Grant and Clements, Esqrs., 305 Maclellan Building, Chattanooga, Tennessee.

Chattanooga, Tennessee
May 6, 1975

BE IT REMEMBERED, the above-entitled cause came on for re-arraignment on this date before the Honorable Frank W. Wilson, United States District Judge, when the following proceedings were had, to-wit:

[2] THE COURT: Would the United States Attorney state for the record the status of this lawsuit?

MR. BOWERS: Yes, if Your Honor please, the matter stands today for re-arraignment on a three-count indictment returned on March 26th, 1975. Mr. Gray was originally arraigned on April 9 of this year, at which time he entered a not guilty plea, and the matter was set for disposition by trial on May 5.

Subsequently the trial date was moved to May the 12th. We then received a plea-bargaining request from the defense counsel and have pursued that matter but, as I say, it stands then for re-arraignment today on the three-count indictment charging respectively for the calendar years 1968, 1969 and 1970 that Mr. Gray, in the filing of a joint income tax return for him and his wife, willfully and knowingly attempted to evade and defeat a large part of the income tax owing by them by understating his taxable income. The figures are stated in the indictment as to the respective understatements, and at this time, by agreement with defense counsel, the government would respectfully move that an interlineation change be made in Count 2 of the indictment.

The secretary inadvertently inserted a figure that should not have gone in the indictment and that is the sixth line from the bottom of Count 2 where the numeral I, $240.98 appears, that figure should be zero and Mr. Summers informs me that with permission of the defendant that change be made on [3] the face of the indictment.

THE COURT: Are you telling the Court that the second count should read in that portion of the count

wherein it was stated that their taxable income was in the sum of zero?

MR. BOWERS: Correct.

THE COURT: All right. Mr. Summers, Mr. Grant, what do you understand that Mr. Gray desires to do regarding a re-arraignment?

MR. SUMMERS: Your Honor, at this time we, on this matter of re-arraignment, we would like to remove the pleas of not guilty previously entered and enter pleas of guilty to the Court on all three counts.

THE COURT: Mr. Gray, I am going to ask the Clerk of the Court to read the indictment. This time you listen carefully as she reads each count.

Following the reading of each count, if you wish to consult with your attorney feel free to do so, or if there is any question you would like to ask the Court don't hesitate to state your question.

Following the reading of each count, if you understand what you are charged with and if you are prepared to do so, you may state your plea.

(Thereupon, the Clerk read Count 1 of the indictment.)

THE CLERK: How do you plead to the first count, Mr. Gray, guilty or not guilty?

[4] MR. GRAY: Guilty.

(Thereupon, the Clerk read Count 2 of the indictment.)

THE CLERK: How do you plead as to the second count, Mr. Gray, guilty or not guilty?

MR. GRAY: Guilty.

(Thereupon, the Clerk read Count 3 of the indictment.)

THE CLERK: How do you plead to the third count, Mr. Gray, guilty or not guilty?

MR. GRAY: Guilty.

THE COURT: Now, Mr. Gray, let me go over this with you and make certain it would be proper to permit you to enter pleas of guilty upon the three counts in the indictment in this case.

Do you understand that in the first count it is charged that for the calendar year 1968 that you filed a false income tax return, that you did so with intent to evade the payment of taxes and reported income of twenty-eight thousand some odd dollars whereas your taxable income was in the sum of sixty-two thousand and some odd dollars, do you understand that is what you are charged with in the first count?

MR. GRAY: Yes, sir.

THE COURT: Well, did you file a false tax return as charged in the first count of the indictment?

MR. GRAY: Yes, sir.

THE COURT: And at the time you did so did you do so [5] with the intent to evade the payment of the tax as charged in the first count?

MR. GRAY: Yes, sir.

THE COURT: Now, in the second count do you understand that it is charged that with reference to the calendar year 1969 that you filed a false income tax return with intent to evade the payment of tax, in which return you reported zero income for the calendar year whereas you had a taxable income of fifty-one thousand some odd dollars, do you understand that that is what you are charged with in the second count of the indictment?

MR. GRAY: Yes, sir.

THE COURT: Well, did you file a false tax return for the calendar year 1969?

MR. GRAY: Yes, sir.

THE COURT: As charged in the second count?

MR. GRAY: Yes, sir.

THE COURT: And did you do so with intent to evade the payment of tax as charged in the second count?

MR. GRAY: Yes, sir.

THE COURT: Now, then the third count charges that for the calendar year 1970 you filed a false income tax return with intent to evade the payment of tax and in that return it is charged that you reported that you had zero taxable income whereas you had taxable income in the sum of fifty-one thousand [6] some odd dollars, do you understand that is what you are charged with in the third count?

MR. GRAY: Yes, sir.

THE COURT: Well, did you file a false income tax return for the calendar year 1970 as charged in the third count?

MR. GRAY: Yes, sir.

THE COURT: And did you do so with intent to evade the payment of tax as charged?

MR. GRAY: Yes, sir.

THE COURT: Mr. Gray, has anyone made any expressed promise to you or promised you any particular leniency or promised you any particular disposition of this lawsuit as a means of persuading or inducing you to enter a plea of guilty?

Now, I understand there have been certain plea negotiations in this matter and I think it would be appropriate, therefore, at this time for the United States Attorney to make such statements as he wishes to make in that regard.

MR. BOWERS: All right, Your Honor, if Your Honor please, if I may.

THE COURT: You gentlemen may just have a seat, if you wish, while the United States Attorney makes his statement.

MR. BOWERS: As was stated to the Court and now to be stated in the presence of the defendant for the first time from the Office of the United States Attorney, we did secure the permission of the Court, pursuant to a request from defense [7] counsel, that we secure such permission to attempt plea negotiations in this matter, looking toward a possible disposition of it.

As is always true, our negotiations in this matter have been conducted with Mr. Summers and with Mr. Grant as attorneys for the defendant, rather than with the defendant himself, and we would at this time propose to state the nature of our recommendation to the Court in the defendant's presence and at the same time we would not ratify, confirm or adopt any different arrangements or promises or inducements that might have been represented to anybody, to him by anyone else, if any, and we have no reason to think that this has been done, but the government would specifically disavow any recommendation except that that we will state in open court.

As is always true, the government requires, first of all, that the defendant's plea of guilty, pleas of guilty, be entered solely and alone because of the guilt of the defendant and not because of any recommendation that the Office of the U. S. Attorney would make.

That having been done, the recommendation of the government in this matter is that as to Count 1 that Mr. Gray be sentenced to a term of imprisonment in the custody of the Attorney General for a period of 18 months, but that all of the execution of all of that sentence except 100 days be suspended and that the 100 days be served in a jail-type institution. In [8] addition thereto, he should pay a fine in lieu of costs of $2,000 on the first count.

On Count 2, the imposition of sentence by the recommendation would be suspended and the defendant placed

on a period of two years probation to follow the term of imprisonment and that he likewise pay a fine of $2,000 on the second count of the indictment.

And, by like token, as to Count 3, that the imposition of sentence be suspended, that he be placed on probation for a period of two years consecutive to the term of imprisonment imposed in Count 1 but concurrent with the probationary period recommended in Count 2 and again that he pay a fine of $2,000 on Count 3, making a total effective-sentence then of 100 days on an 8 month sentence, a fine total of $6,000 and that fine be paid at the time of the imposition of sentence or at the time that the sentence be executed and the only other recommendation of the Office of the U. S. Attorney, because of the extensive business interests of Mr. Gray, it is our recommendation that the execution of all of this sentence be suspended for a period of 30 days from today, regardless of the date of imposition of the sentence, and the execution thereof, that he have 30 days from today in which to arrange his affairs before the service of the sentence and that is the total recommendation of the Office of the United States Attorney.

THE COURT: All right. Mr. Summers, Mr. Grant, [9] does the statement made by the United States Attorney now correspond with your understanding of your conversations with the United States Attorney?

MR. SUMMERS: Yes, sir.

THE COURT: Mr. Gray, you have heard the statement made by the United States Attorney. Does that correspond with your understanding as conveyed by your attorneys?

MR. GRAY: Yes, sir.

THE COURT: Now, Mr. Gray, I would want you to understand that any recommendation by the United States Attorney, of course, would be taken into considera-

tion by the Court but I would want you to further understand that the Court would make an independent determination of the disposition of this case.

Now, I would not want you to be entering any plea of guilty here with any understanding that the Court is committed to that plea. If the Court should elect not to follow the recommendation of the United States Attorney you, of course, would be permitted to withdraw your plea and reconsider your plea. I would want you to understand that the Court will not accept a plea of guilty if it is conditioned in any manner, including being conditioned upon the representations made by the United States Attorney.

At this time do you understand what I have stated to you?

[10] MR. GRAY: Yes, sir.

THE COURT: And are your pleas of guilty here today conditioned in any manner or are you offering unconditioned pleas of guilty?

MR. GRAY: Unconditioned.

MR. BOWERS: Your Honor, may I interrupt just a moment? I should have made that announcement to the Court, that was discussed in the negotiations and defense counsel were aware of it, that was communicated to them by me and I should have stated it.

In addition to that, I should have stated for the Court's elucidation that Mr. Gray should have been advised through his attorneys, and I am sure he has likewise, that the matters that we are attempting to reach a disposition of is the criminal case alone, it makes no disposition of the civil tax liability of Mr. Gray and he should understand that.

THE COURT: Does that additional representation of the United States Attorney correspond with the defense counsel's understanding?

MR. SUMMERS: Yes, Your Honor, that is correct.

THE COURT: All right. Now, Mr. Gray, I assume you have conveyed to your attorneys such information as you may have about these charges in order that they may be in position to advise and counsel with you, have you done that?

MR. GRAY: Yes, sir.

[11] THE COURT: And I assume that they may have made certain recommendations to you, but what I would like to know at this point is, irregardless of what representations your attorneys may have been giving you or what advice they may have given to you, ultimately was it your own decision to enter the pleas of guilty here today?

MR. GRAY: Yes, sir.

THE COURT: Do I understand then, Mr. Gray, that you have entered your pleas of guilty here irrespective and voluntarily, is that a correct statement?

MR. GRAY: Yes, sir.

THE COURT: And you have done so with full understanding as to exactly what you feel you have entered pleas of guilty to, is that a correct statement?

MR. GRAY: Yes, sir.

THE COURT: Now, Mr. Gray, the law, of course, provides a maximum penalty that may be imposed with respect to each count.

I assume your attorneys have advised you regarding that but you are entitled to have that advice in open court, so I am going to ask the United States Attorney to state for the record the maximum penalty that could be imposed with respect to each count.

MR. BOWERS: Your Honor, the maximum penalty that could be imposed with respect to each count would be a term of [12] imprisonment of up to a period of five years and/or a sentence or a fine of $10,000 per

count, so that the maximum exposure of the defendant on all three counts would be a term of imprisonment of up to 15 years and a fine of up to $30,000.

THE COURT: Having been advised as to the maximum penalty that could be imposed, Mr. Gray, does that change your pleas that you have offered here today?

MR. GRAY: No, sir.

THE COURT: Now, does the government represent that it has proof of the matters charged in the indictment in this case? If so, would you state succinctly what that proof might be?

MR. LEDFORD: May it please the Court, the government's proof would be essentially as follows:

The government would establish that Paul F. Gray, Jr., willfully attempted to understate substantially his and his wife's joint taxable income for the years 1968 through 1970 with a total taxable income of $137,712.66 and the resulting total tax deficiency of $48,754.29.

Because Mr. Gray exercised his rights under the Fifth Amendment and refused to cooperate during the investigation by the special agent, the agent computed the correct taxable income through the net worth and personal expenditures method.

The primary sources for this computation were Gray's [13] accountant's work papers concerning the individual tax returns for the years involved, regarding various assets, public records of Hamilton County and third party contacts.

The accountant's work papers provided the base for reconciling specific items to the appropriate asset group on the tax returns.

The additional assets uncovered during the investigation, for example, land and an apartment complex or furniture were then added to the appropriate assets or group classification of the depreciable assets.

The initial contact with the taxpayer for this prosecution period was on June 5th, 1973. The revenue agent decided that the probable cause of income which was not reported was the Playmate Club and specifically the cover charge therefor. Since they had a monthly analysis that the deposits and cash expenditures for 1971 exceed the sales on the books by $30,523.68, Gray later stated that he maintained a daily receipts record for the operation of the Playmate Club and that he prepared his own bank deposits and kept duplicate deposit tickets.

He indicated that he provided his accountant with those deposit tickets to prepare the tax returns and admitted that he realized that if he failed to deposit all of the receipts in those bank accounts his accountant would not be able to record them correctly in the business receipts.

[14] Gray refused to turn over any personal records. The evidence shows that Mr. Gray frequently dealt in cash.

Mr. Gray stated that he borrowed funds, he stated he obtained loans from banks and from other individuals about which he could not tell anyone. He implies that he had obtained these loans using false names and if he were to indicate where he got the loans and the name that he used the people that helped him would get in trouble. He stated that the loans received would only amount to approximately $30,000.

The only specific lead given to the possible loans concerned Arthel Gray, Mr. Gray's brother. Arthel Gray arrived at the special agent's office with a lawyer but no records and no memory of any loans were obtained at that time.

THE COURT: Would counsel or Mr. Gray care to make any correction or any addition to the statement made by the United States Attorney at this point?

MR. SUMMERS: None at this time.

THE COURT: Mr. Gray, would you wish to make any correction or any addition to the statement made by the United States Attorney?

MR. GRAY: No, sir.

TH0 COURT: Mr. Gray, let me go further now and explain to you your right to have a trial. I am certain these matters have been explained to you by your attorney but let me show on the record. Do you understand, of course, you are [15] entitled to have a trial in this case, a trial before a jury of twelve men and women, you would be entitled to require the government to prove the charges against you and to bring into open court any witnesses that might testify against you and have them testify in your presence, where you would hear everything that was said.

You, of course, would be entitled to have your attorneys examine and cross examine all of the witnesses.

You would be entitled to bring into court any witnesses that you might wish to have testify in your behalf and to have them brought in by subpoena or by order of the Court, if that were necessary.

At the trial you could take the witness stand and testify yourself, if you wished to do so, or if for any reason you didn't wish to testify you could not be compelled to testify.

Do you understand that you have all of these rights with respect to having a trial in this lawsuit?

MR. GRAY: Yes, sir.

THE COURT: Well, now, you further understand that if I receive your pleas of guilty that there will be no witnesses brought in, there will be no trial in the case but, rather, the Court would proceed with the disposition in this case on the basis of your pleas of guilty, do you understand that?

MR. GRAY: Yes, sir.

[16] THE COURT: With that understanding do you wish the Court to receive your pleas of guilty here today?

MR. GRAY: Yes, sir.

THE COURT: Does the United States Attorney know of any reason why the Court should not receive a plea of guilty upon each of the three counts?

MR. BOWERS: None, Your Honor.

THE COURT: Does counsel for the defendant know of any reason why the Court should not receive a plea of guilty upon each of the three counts?

MR. SUMMERS: None, Your Honor.

THE COURT: Very well. Allow a plea of guilty to enter with respect to each of the three counts of the indictment.

Now, I understand from the probation office this morning that they have prepared a pre-sentence report. The Court has had no opportunity to read that report at this time.

Do I understand correctly that that report is available to the Court?

MR. HUNT: That is correct, Your Honor.

THE COURT: Well, the Court will want to have an opportunity to read that report and accordingly will want to set this matter for disposition at some later hour this afternoon or some later day this week. Any reason why—

MR. SUMMERS: (Interposing) Your Honor?

[17] THE COURT: Yes.

MR. SUMMERS: Would it be any possibility on Friday?

THE COURT: Set it for Friday.

MR. BOWERS: If Your Honor please, insofar as the government is concerned, it would be a distinct accommodation if it could be disposed of at any hour later today.

THE COURT: Yes, we could dispose of it.

MR. BOWERS: I have a grand jury day after tomorrow, it would be inconvenient.

MR. SUMMERS: Your Honor, in this matter we have filed—Mr. Shockley in Mr. Hunt's office has done a thorough investigation—we have filed a memorandum in support of the sentence.

THE COURT: That was handed to me just as I came on the bench, I have not had a chance to read that.

MR. SUMMERS: The reason it comes at this late hour is because some of the material, there's petitions that were attached to it as exhibits, last evening, that we did not obtain until this morning.

Your Honor, I have an appointment at 4 o'clock, at 4:00 and 5:00, that were set. I feel like the matter at 4:00, it is important that I be there, and if the Court around that particular 4 o'clock point would probably take 45 minutes, I would be glad to—

THE COURT: (Interposing) Well, do you want to set [18] the matter over to 3 o'clock this afternoon and dispose of it at that time?

MR. SUMMERS: If that will be of sufficient time for the Court.

THE COURT: Yes.

MR. SUMMERS: Your Honor, one other matter that if I might make a brief comment on this matter. We filed this memorandum, Your Honor, supposedly hopefully to point out some matters that we feel are pertinent in this matter and we also have, and I believe in the investigation by Mr. Shockley and Mr. Hunt, they have interviewed many citizens in regard to Mr. Gray.

I would point out also Mr. Garrison Siskin has taken time, who is very familiar with him, is a highly respected individual in this community, has taken out of his very busy schedule to come in on Mr. Gray's behalf and he is in the back of the court.

THE COURT: Well, if there is anyone that you wish to present or to make a statement at this time I would receive that at this time so they will not be required to be back at 3 o'clock, if that is what you desire to do.

MR. SUMMERS: That is what I would ilke, Your Honor. I believe also Mr. Siskin has furnished a letter in behalf of Mr. Gray, which was furnished in the probation office but we would like to very briefly put him on.

[19] THE COURT: All right. So he may just come to the podium and make any statement he wishes to make at this time.

Mr. Gray, you may have a seat, if you wish to.

MR. SUMMERS: Excuse me just a moment.

THE COURT: All right. Mr. Siskin, you may make any statement that you wish to make at this time.

(Thereupon, Mr. Siskin made his statement to the Court.)

THE COURT: All right. Well, thank you very much, Mr. Siskin. Anything else, Mr. Summers?

MR. SUMMERS: Yes, Your Honor. I very briefly in the memorandum have two or three points we would like to emphasize, Your Honor, in the Court's consideration of this matter, mainly, the main situation is seated in the courtroom, is Mr. Gray is the father of six children, that of these children there are four of them, at least three, possibly four, residing with him.

We point out that he has been divorced in the past, he has had several marriages, but I can truthfully say in my representation of this man he has placed his children above anything and they are here with him in support of their father and that we respectfully submit that he does show concern and care and love his children, that he is a man of stature in his community.

They are here. They have been interviewed, I believe [20] very thoroughly by Mr. Shockley and Mr. Hunt, and I point this out in regard to the fact that this man, in my own personal knowledge, that he has placed his children above anything else, his children have come first in this man's life.

The other matter, Your Honor, that I would point out respectfully to the Court for particular attention would be the fact in regard, Your Honor, that this man has numerous, coming from a limited education, he has taken over a business with the untimely death of his father, he has worked, a man who has worked hard all of his life, some of his businesses he has created them, he took over the Yellow Cab Company from his father, his father died unexpectedly and he operates that business. He has got into other business ventures, some of which have been successful, some of which has not.

He has a tremendous amount of property. He also has indebtedness in these businesses. There are a tremendous number of individuals who are dependent upon him. He is a man that not only owns these businessess, Your Honor, but he works actively in them.

For example, in regard to the nightclubs, this man works and we submit it is very essential that he be present.

In regard to whatever period the Court feels incarceration is necessary, of course, for this matter, that we hope the matter would be minimalized to the extent that he can at least continue to keep his businesses operating for these [21] simple reasons.

We have acknowledged in our memorandum some indebtednesses which we feel, Your Honor, that without Mr. Gray's presence that these businesses would be in jeopardy and not only for his children that live with him and it creates a real problem as to someone to look after these children, all of these children except the two oldest,

the oldest son and the oldest daughter, are in their formative years, therefore, adolescence is pointed out in the memorandum and between the ages of 13 and 21.

Your Honor, I would also respectfully point out to the Court we have attached some letters of recommendation from various respected people in this community, Mr. Garrison Siskin is a respected gentleman, Mr. George Stewart of the United Bank.

In regard to other individuals that have signed, Mr. Malcolm Adamson, in regard to his charitable activities. You have heard from Mr. Siskin.

I also respectfully ask the Court to consider the letter from the Bonny Oaks School, Mr. Malcolm Adamson, superintendent.

Your Honor, there are also a list or petition which has been circulated signed by individuals and law enforcement officers.

Your Honor, very simply this matter is a matter for the Court and we submit this memorandum for the Court's [22] consideration in arriving at its ultimate decision as to what to do in the case of Paul Gray.

He has acknowledged his guilt before Your Honor, has violated the law. We ask the Court that Your Honor consider the probation report of the probation office, our memorandum, arrive at a decision which the Court feels would be justice tempered with mercy.

THE COURT: Gentlemen, I overlooked the fact that I do have another matter this afternoon that is going to prevent my giving proper attention to this matter before 3 o'clock.

Mr. Bowers, are you scheduled to be in Chattanooga any day in the near future?

MR. BOWERS: No, Your Honor, I am not. I have a grand jury in Knoxville the day after tomorrow. I have to go to a white collar crime school the following

week of May 12th to the 16th and will be out of my office the entire week, so that when I return I will be—

THE COURT: (Interposing) Well, do you feel that it would be necessary for you to be present? I realize you would desire to be present. Do you feel it would be necessary for you to be present if we were to set the matter over until one day here?

MR. BOWERS: Of course, it isn't necessary, Your Honor, but I do have an intensive desire to be present in each case, as I have attempted to and intend to continue to keep [23] giving plea bargaining my personal attention and I would like very much to be present.

THE COURT: Well, now, I would set it at any time that you have a preference but I would be unable to give this matter the attention this afternoon that I will want to give it.

MR. BOWERS: May I leave the courtroom half a minute and get my schedule?

THE COURT: Yes.

MR. LEDFORD: May it please the Court, if the Court is referring to the Ladd matter set at 3:00, that will only take approximately—

THE COURT: (Interposing) No, I have some others. I do have that matter set at 3 o'clock, too, but I had in mind taking this matter up before the Ladd case was heard.

MR. BOWERS: If Your Honor please, on the first day after my return from Washington we have arraignments in Knoxville on the 19th, the 21st or 22nd of May, if those dates are convenient I will arrange my schedule to make them convenient to me.

THE COURT: The 21st?

MR. BOWERS: 21st is fine, Your Honor.

THE COURT: All right. Mr. Summers, the 21st of May has been suggested as a date for further disposition

of this case. Now, we want to set it at 1 o'clock that day.

[24] MR. SUMMERS: I have a matter but I can re-arrange it, Your Honor.

THE COURT: At 1 o'clock?

MR. SUMMERS: Your Honor, could I have just a moment to confer with Mr. Gray just one second?

THE COURT: Yes.

MR. GRANT: With permission of the Court I will be at U. S. Army Camp that week but Mr. Summers agreed to handle the matter, if there would be no objection.

THE COURT: All right. Anything further?

MR. SUMMERS: Your Honor, I want to make it perfectly clear, I don't think there is a problem but there is some concern, we fully recognize that Mr. Gray understands that the agreement with the United States Attorney is the hundred days would be active time, that is the agreement between our office and the U. S. Attorney. Of course, there is still a matter for the Court's review and determination as to what, if any, sentence would be imposed but there seems to be concern and we wish fully to be accurate that we do understand that representation to the Court, that is the understanding.

THE COURT: Now, as I further understand, it is part of the recommendation of the United States Attorney that if the Court adopts the recommendation that the sentence would become effective 30 days from this date, is that your understanding, Mr. Summers?

[25] In other words, we are delaying the sentence for a period of two weeks, approximately, in order to give the Court an opportunity to study this, in order to accommodate all counsel in the case.

MR. SUMMERS: Your Honor, that is the understanding. I don't want to be in position of backing off from anything we agreed to, that Mr. Gray does have difficult

business responsibilities and in that regard I don't know if that would impose anything, we would like to have more time but we have agreed to that.

THE COURT: You may present any matter you wish to present in that regard at that time that the case is considered.

Now, as I understand it it would accommodate counsel and all parties if this were set for judgment at 1 o'clock on May the 21st, that would be two weeks from tomorrow, is that correct?

MR. BOWERS: That is correct, if Your Honor please.

MR. SUMMERS: Yes.

THE COURT: All right. That will be all at this time.

Mr. Gray, let me ask you, do you feel like you understand the proceedings we have had in your case today?

MR. GRAY: Yes, sir.

THE COURT: Are there any questions you would like to ask about anything that occurred here today or anything [26] pertaining to your case?

MR. GRAY: No, sir.

THE COURT: Anything else that counsel would wish to take up with the Court at this time?

MR. SUMMERS: No.

THE COURT: Very well. This case will be re-set then for 1:00 P. M. on May the 21st for further consideration.

(Thereupon, at 1:58 P. M. court was in recess.)

[27] OFFICIAL REPORTER'S CERTIFICATE

I, Richard Smith, Official Court Reporter for the United States District Court, Eastern District of Tennessee, Southern Division, do hereby certify that I reported the foregoing proceedings in machine shorthand and afterwards reduced to typewriting such portions of the record as requested by Attorney H. Wayne Grant, which consisted of the remarks of all counsel and the Court regarding the re-arraignment in this case.

Given under my hand at Chattanooga, Tennessee, this 4th day of September, 1979.

/s/ Richard Smith
Richard Smith
Official Court Reporter.

of States of America vs.

DEFENDANT: PAUL E. GRAY, JR. — DISTRICT OF: EASTERN DISTRICT OF TENNESSEE

DOCKET NO.: CR-1-75-8

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date: MONTH June, DAY 17, YEAR 1975

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Jerry Summers and Wayne Grant, Retained (Name of counsel)

PLEA

[X] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged
[X] GUILTY.

Defendant has been convicted as charged of the offense(s) of Cts. 1,2,3, during calendar years 1968, 1969, and 1970, willfully and knowingly attempting to evade and defeat a large part of income tax due and owing by him and his wife to the United States of America by preparing and causing to be prepared, signing and causing to be signed, and mailing and causing to be mailed in the Eastern District of Tennessee false and fraudulent income tax returns on behalf of himself and his wife which were filed with the Internal Revenue Service, in violation of the laws of the United States, Section 7201, Internal Revenue Code; 26 U.S.C., Section 7201, as charged in the indictment.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of EIGHTEEN (18) MONTHS on Count 1 of the indictment, and fined the sum of TWO THOUSAND DOLLARS ($2,000.00) in lieu of costs.

IT IS ADJUDGED that the execution of all except ONE HUNDRED (100) DAYS of the sentence imposed upon Count 1 is suspended, said ONE HUNDRED (100) DAYS to be served in a jail-type institution.

SPECIAL CONDITIONS OF PROBATION

Imposition of sentence on Counts 2 and 3 of the indictment is hereby suspended and the defendant placed on probation for a period of TWO (2) YEARS upon each count, concurrent as to counts, but consecutive to term of imprisonment imposed on Count 1, and fined the sum of TWO THOUSAND DOLLARS ($2,000.00) upon each of Counts 2 and 3.

Execution of the term of imprisonment under Count 1 is suspended until 9:00 A.M., Wednesday, July 30, 1975.

RECEIVED
JUN 17 1975
U. S. Attorney's Office

JUN 17 1975

Filed ___ day of _____ 19__
Ent'd Order By 12/103 C
Karl D. Saulpaw, Jr., Clerk
By _____
Dep. Clerk

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

DEPARTMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY
[ ] U.S. District Judge
[ ] U.S. Magistrate

Date June 17, 1975

ATTEST:
A true copy.
Certified this DEC .
Robert L. [illegible], CLERK
By _____
Deputy Clerk

45

(Filed March 26, 1975)

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF TENNESSEE
NORTHEASTERN DIVISION

CRIMINAL NO. CR-1-75-8

UNITED STATES OF AMERICA

vs.

PAUL F. GRAY, JR.

COUNT I

The Grand Jury charges that on or about the 15th day of April, 1969, in the Eastern District of Tennessee, PAUL F. GRAY, JR., a resident of Tennessee, who during the calendar year 1968 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1968, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the Eastern District of Tennessee a false and fraudulent income tax return on behalf of himself and his said wife, which was filed with the Internal Revenue Service, wherein it was stated that their taxable income for said calendar year was the sum of $28,074.07, and that the amount of tax due and owing thereon was the sum of $6,096.80, whereas, as he then and there well knew, their joint taxable income for the said calendar year was the sum of $62,819.72, upon which said taxable income there was owing to the United States of America an income tax of $17,985.16.

(In violation of Section 7201, Internal Revenue Code; 26 U.S.C., Section 7201) for the calendar year 1970, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the Eastern District of Tennessee a false and fraudulent income tax return on behalf of himself and his said wife, which was filed with the Internal Revenue Service, wherein it was stated that their taxable income for said calendar year was None, and that the amount of tax due and owing thereon was zero, whereas, as he then and there well knew, their joint taxable income for the said calendar year was the sum of $51,029.11, upon which said taxable income there was owing to the United States of America an income tax of $17,869.81.

(In violation of Section 7201, Internal Revenue Code; 26 U.S.C., Section 7201)

/s/ (Illegible)
United States Attorney

A TRUE BILL:
/s/ Christopher W. Williams
Foreman

COUNT II

The Grand Jury further charges that on or about the 14th day of May, 1970, in the Eastern District of Tennessee, PAUL F. GRAY, JR., a resident of Tennessee, who during the calendar year 1969 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1969, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the Eastern District of Tennessee, a false and

fraudulent income tax return on behalf of himself and his said wife, which was filed with the Internal Revenue Service, wherein it was stated that their taxable income was the sum of $1,240.98 for said calendar year, and that the amount of tax due and owing thereon was zero, whereas, as he then and there well knew, their joint taxable income was the sum of $51,937.90, upon which said taxable income there was owing to the United States of America an income tax of $18,996.12.

(In violation of Section 7201, Internal Revenue Code; 26 U.S.C., Section 7201)

COUNT III

The Grand Jury further charges that on or about the 26th day of April, 1971, in the Eastern District of Tennessee, PAUL F. GRAY, JR., a resident of Tennessee, who during the calendar year 1970 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1970, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the Eastern District of Tennessee a false and fraudulent income tax return on behalf of himself and his said wife, which was filed with the Internal Revenue Service, wherein it was stated that their taxable income for said calendar year was None, and that the amount of tax due and owing thereon was zero, whereas, as he then and there well knew, their joint taxable income for the said calendar year was the sum of $51,029.11, upon which said taxable income there was owing to the United States of America an income tax of $17,869.81.

(In violation of Section 7201, Internal Revenue Code; 26 U.S.C. Section 7201)

.....
United States Attorney

A TRUE BILL:

.....
Foreman

No. 83-1121

In the Supreme Court of the United States

OCTOBER TERM, 1983

PAUL F. GRAY, JR., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner challenges the determination that his plea of guilty to criminal tax fraud collaterally estops him from denying that his underpayment of tax for the years in question was "due to fraud" for purposes of the civil fraud penalty. The decision below is correct, does not conflict with that of any other circuit, and does not warrant review by this Court.

1. Petitioner was indicted in 1975 on three counts of willfully attempting to evade income taxes for 1968-1970, in violation of Section 7201 of the Code.[1] Pursuant to a plea agreement, petitioner offered to plead guilty to all three counts (Pet. App. A26, A36-A38). A hearing was held in the United States District Court for the Eastern District of

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[1]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

Tennessee, at which petitioner admitted that he had filed false tax returns for 1968-1970 and had done so with the intent to evade tax (*id.* at A38-A40). The Assistant United States Attorney represented that the plea agreement involved "disposition of * * * the criminal case alone [and made] no disposition of [petitioner's] civil tax liability" (*id.* at A43). Petitioner and his counsel agreed with that representation (*id.* at A43-A44). The district court accepted petitioner's guilty plea, approved the plea bargain, and entered a judgment of conviction (*id.* at A26, A43-A48). Petitioner was sentenced accordingly and has complied with the terms of his sentence (*id.* at A26).

In April 1976, after the criminal proceedings were over, the Commissioner sent petitioner a notice of deficiency for 1968-1970, asserting deficiencies in income tax and civil fraud penalties under Section 6653(b) for those years (Pet. App. A2).[2] Petitioner sought redetermination in the Tax Court. It sustained the deficiencies and fraud penalties, holding in the latter respect that petitioner's guilty plea collaterally estopped him from denying that his underpayments of tax were "due to fraud" within the meaning of Section 6653(b) (Pet. App. A19, A24).[3]

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[2]Section 6653(b) imposes an "addition to the tax," commonly referred to as a penalty, "[i]f any part of any underpayment * * * of tax required to be shown on a return is due to fraud." The penalty is "an amount equal to 50 percent of the underpayment" (*ibid.*).

[3]After the Tax Court granted the Commissioner's motion for partial summary judgment on the question of fraud, petitioner sought a writ coram nobis from the district court, seeking to set aside his tax evasion conviction on the theory that the IRS had breached the plea agreement by sending him a notice of deficiency and by "using the doctrine of collateral estoppel to preclude [his] denial of [civil fraud] liability" (Pet. App. A33). The district court denied his motion (*id.* at A33-A34), and the Sixth Circuit affirmed, holding that the preclusive effect of a guilty plea in a subsequent civil tax proceeding is not a "direct consequence" of the plea of which a defendant must be advised (*id.* at A27-A28), and finding no evidence that the prosecutor had "misled [petitioner] with respect to the separate issue of civil [tax] liability" (*id.* at A28). This Court denied certiorari. *Gray* v. *United States*, 454 U.S. 1143 (1982).

The court of appeals affirmed the Tax Court, one judge dissenting (Pet. App. A1-A15).[4] The majority noted that petitioner's guilty plea resulted in "a forthright judicial determination * * * that he was guilty [of tax fraud]" and that his judgment of conviction thus constituted "an adjudication on the merits of the fraud issue" (*id.* at A5, A6). It accordingly held that his plea of guilty "conclusively establishe[d] fraud in [the] subsequent civil tax fraud proceeding through application of the doctrine of collateral estoppel," noting that this holding accorded with that of every other circuit that has considered the question (*id.* at A7 (citing cases)). The dissenting judge believed that collateral estoppel should not apply, expressing the view that petitioner's conviction upon plea of guilty did not constitute an "actual adjudication" of fraud and that, even if it did, the plea bargain procedure did not afford petitioner a "full and fair opportunity" to litigate it (*id.* at A10).

2. The courts below correctly held that petitioner was collaterally estopped from relitigating the issue of fraud. "Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits * * * involving a party to the prior litigation," provided that such party has had a "full and fair opportunity" to litigate the matter in the earlier case. *Montana* v. *United States*, 440 U.S. 147, 153 (1979). Accord, *e.g.*, *United States* v. *Mendoza*, No. 82-849 (Jan. 10, 1984), slip op. 4; *Allen* v. *McCurry*, 449 U.S. 90, 94-95 (1980). Here, the district court that convicted petitioner of tax evasion for 1968-1970 "actually and necessarily determined" that at least part of his underpayment of tax for those years was "due to fraud" within the meaning of Section 6653(b), since "[t]he constituent elements of criminal tax evasion and of civil tax fraud

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[4]The opinion of the court of appeals is reported at 708 F.2d 243.

are identical." *Hicks Co.* v. *Commissioner*, 470 F.2d 87, 90 (1st Cir. 1972); *Moore* v. *Commissioner*, 360 F.2d 353, 356 (4th Cir. 1965). See *Tomlinson* v. *Lefkowitz*, 334 F.2d 262, 265 (5th Cir. 1964), cert. denied, 379 U.S. 962 (1965). Petitioner, moreover, plainly had a "full and fair opportunity" to litigate the issue of fraud in connection with his plea agreement, since, as the court of appeals noted (Pet. App. A6-A7), he was fully examined about his understanding of the charges contained in the indictment and voluntarily admitted that he had filed false returns for 1968-1970 with the intent to evade tax.

In holding that collateral estoppel applied in these circumstances, the Sixth Circuit below followed the decisions of every other circuit that has considered the question. The courts of appeals have uniformly held that a conviction for tax evasion by filing false returns under Section 7201, whether upon a plea of guilty or a jury verdict after a trial, conclusively establishes fraud in a subsequent civil tax proceeding by virtue of collateral estoppel. *Fontneau* v. *United States*, 654 F.2d 8, 10 (1st Cir. 1981) (guilty plea); *Plunkett* v. *Commissioner*, 465 F.2d 299, 305-307 (7th Cir. 1972) (guilty plea); *Neaderland* v. *Commissioner*, 424 F.2d 639, 642 (2d Cir.), cert. denied, 400 U.S. 827 (1970) (conviction following trial); *Moore*, 360 F.2d at 355-356 (conviction following trial); *Armstrong* v. *United States*, 354 F.2d 274, 291 (Ct. Cl. 1965) (conviction following trial); *Tomlinson*, 334 F.2d at 265 (conviction following trial); *Arctic Ice Cream Co.* v. *Commissioner*, 43 T.C. 68, 75 (1964) (guilty plea). Cf. *Considine* v. *United States*, 683 F.2d 1285, 1287 (9th Cir. 1982) (conviction for willfully filing false returns under Section 7206(1) collaterally estops taxpayer from contesting falsity in subsequent civil proceeding).[5]

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[5]Contrary to petitioner's contention (Pet. 16-17), *Kreps* v. *Commissioner*, 351 F.2d 1 (2d Cir. 1965), does not conflict either with the cases cited above or with the decision below. The Second Circuit there found

3. Petitioner's reliance (Pet. 8-9) on *United States* v. *International Building Co.*, 345 U.S. 502 (1953), is misplaced. In that case, which involved the preclusive effect of a prior Tax Court proceeding, this Court reiterated that estoppel by judgment presupposes an "adjudication of the merits," *i.e.*, a situation in which an issue has been "actually presented and determined in an earlier suit." 345 U.S. at 506. The Court noted that the issue in question there, having been abandoned by joint stipulation of the parties, had not actually been adjudicated by the Tax Court, and this Court accordingly held that res judicata did not apply. 345 U.S. at 506. Here, by contrast, the issue of fraud was plainly "presented to" the district court and "adjudicated on the merits," since petitioner was convicted of tax evasion after being fully advised of the elements of the crime charged, of the nature of the evidence the government was prepared to

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it "unnecessary to consider" the taxpayer's contention that his guilty plea should not be accorded preclusive effect, noting that his plea at least constituted admissible evidence and that the evidence as a whole established fraud. 351 F.2d at 6. As petitioner observes (Pet. 11-12), some commentators have expressed reservations, on policy grounds, about the desirability of according preclusive effect to criminal convictions based on guilty pleas. See Wright, Miller & Cooper, *Federal Practice and Procedure* § 4474, at 759-760 (1981); 1B Moore, Lucas & Currier, *Moore's Federal Practice* para. 0.418[1], at 558-559 (2d ed. 1983). Those commentators, however, do not discuss the issue in the federal income tax context, and in any event are frank to admit that their reservations have not been shared by the federal appellate courts. See 1B Moore, Lucas & Currier, *supra*, para. 0.418[1], at 557 (footnote omitted) (noting that "the generally accepted rule is that a judgment of conviction, based on a plea of guilty, is conclusive in a civil suit between the same parties of all the issues that would have been determined by a conviction after a contested trial"); Wright, Miller & Cooper, *supra*, § 4474, at 760 (footnotes omitted) (noting that "many decisions use guilty pleas to establish issue preclusion both in subsequent civil litigation with the government and in subsequent private litigation").

present, and of the direct consequences of his guilty plea (Pet. App. A42-A48).[6]

At bottom, petitioner's objection seems to be (see Pet. 14) that he was unaware of the collateral tax consequences of his guilty plea at the time he entered it. But petitioner's awareness of such collateral effects would be relevant, if at all, only in determining whether his plea was "voluntary." As noted above (see page 2 note 2, *supra*), the court of appeals previously determined that petitioner's guilty plea "conform[ed] to the constitutional standards of voluntariness," holding that collateral civil tax effects were not a "direct consequence" of his plea of which he had to be explicitly informed (Pet. App. A27). This Court has already denied certiorari (454 U.S. 1143) on that question.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

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[6]Petitioner's reliance (Pet. 16-17) on *Adolph Coors Co.* v. *Commissioner*, 519 F.2d 1280 (10th Cir. 1975), is similarly misplaced. That case had nothing to with the collateral estoppel effect of a prior criminal conviction. Like *International Building Co.*, it held only that collateral estoppel does not apply where an issue has been raised in a prior civil proceeding, but has been abandoned by the party raising it and thus not adjudicated on the merits. 519 F.2d at 1283.

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